DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-399
Title: Adoptive Couple, Petitioners
v.
Baby Girl, a Minor Child Under the Age of Fourteen Years, et al.
Docketed: October 1, 2012
Lower Ct: Supreme Court of South Carolina
Case Nos.: (27148)
Decision Date: July 26, 2012
Rehearing Denied: August 22, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 1 2012	Petition for a writ of certiorari filed. (Response due October 31, 2012)
Oct 1 2012	Motion for leave to file Appendix B under seal filed by petitioners.
Oct 22 2012	Brief of respondent Guardian ad Litem, as representative of respondent Baby Girl filed.
Oct 26 2012	Order extending time to file response to petition to and including November 30, 2012.
Oct 31 2012	Brief amicus curiae of American Academy of Adoption Attorneys filed.
Oct 31 2012	Brief amicus curiae of Birth Mother filed.
Oct 31 2012	Brief amicus curiae of National Council for Adoption filed.
Oct 31 2012	Motion for leave to file amici brief filed by Professors Joan Heifetz Hollinger, et al.
Oct 31 2012	Brief amici curiae of California State Association of Counties, et al. filed.
Nov 30 2012	Brief of respondents Birth Father and Cherokee Nation in opposition filed.
Dec 11 2012	Reply of petitioners Adoptive Couple filed.
Dec 12 2012	DISTRIBUTED for Conference of January 4, 2013
Jan 4 2013	Motion for leave to file Appendix B under seal GRANTED.
Jan 4 2013	Motion for leave to file amici brief filed by Professors Joan Heifetz Hollinger, et al. GRANTED.
Jan 4 2013	Petition GRANTED.
Feb 11 2013	SET FOR ARGUMENT ON Tuesday, April 16, 2013
Feb 11 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners
Feb 11 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondent Guardian Ad Litem of Baby

Girl.

Feb 19 2013 Brief of petitioner Adoptive Couple filed.

Feb 19 2013 Motion for leave to file Joint Appendix under seal filed by petitioner Adoptive Couple.

Feb 19 2013 Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents Birth Father and Cherokee Nation.

Feb 19 2013 Brief of respondent Guardian ad Litem, as representative of respondent Baby Girl, supporting reversal filed.

Feb 26 2013 Brief amici curiae of Professors Joan Heifetz Hollinger, et al. filed.

Feb 26 2013 Brief amicus curiae of American Academy of Adoption Attorneys filed.

Feb 26 2013 Brief amicus curiae of Birth Mother filed.

Feb 26 2013 Brief amicus curiae of Christian Alliance for Indian Child Welfare filed.

Feb 26 2013 Brief amicus curiae of National Council for Adoption filed.

Feb 26 2013 Brief amici curiae of Child Advocacy Organizations filed.

Feb 26 2013 Brief amici curiae of Bonnie and Shannon Hofer, et al. filed.

Feb 26 2013 CIRCULATED.

Feb 26 2013 Brief amicus curiae of Adoptive Parents Committee, Inc. filed. (Distributed)

Feb 26 2013 Brief amicus curiae of Citizens Equal Rights Foundation filed. (Distributed)

Feb 27 2013 Motion DISTRIBUTED for Conference of March 15, 2013.

Mar 15 2013 The motion of petitioners for leave to file the joint appendix under seal is denied without prejudice to filing a renewed motion together with either a redacted joint appendix, or an explanation as to why the joint appendix may not be redacted, within 14 days.

Mar 15 2013 Brief amicus curiae of the United States filed. (Distributed)

Mar 18 2013 Motion for divided argument filed by petitioners Adoptive Couple and respondent Guardian ad Litem as Representative of Respondent baby Girl.

Mar 19 2013 Record from Supreme Court of South Carolina is electronic.

Mar 21 2013 Motion of Birth Mother for leave to participate in oral argument as amicus curiae and for divided argument filed.

Mar 21 2013 Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Mar 21 2013 Renewed motion of petitioners for leave to file the joint appendix under seal with redacted copies for the public record.

Mar 21 2013 Brief of respondent Birth Father filed. (Distributed)

Mar 21 2013 Motion for divided argument filed by respondent Cherokee Nation.

Mar 21 2013 Brief of respondent Cherokee Nation filed. (Distributed)

Mar 22 2013 Brief amici curiae of Professors of Indian Law filed. (Distributed)

Mar 26 2013 Brief amicus curiae of Hamline University School of Law Child Advocacy Clinic filed. (Distributed)

Mar 26 2013 Brief amicus curiae of Honorable Abby Abinanti, Chief Justice of the Yurok Tribal Court filed.

Mar 26 2013 Brief amicus curiae of Navajo Nation filed. (Distributed)

Mar 27 2013 Brief amici curiae of Seminole Tribe of Florida, et al. filed. (Distributed)

Mar 27 2013 Brief amici curiae of Lower Sioux Indian Community, et al. filed. (Distributed)

Mar 27 2013	Brief amicus curiae of National Latina/o Psychological Association, et al. filed (Distributed)
Mar 28 2013	Brief amici curiae of Friends Committee on National Legislation, et al. filed (Distributed)
Mar 28 2013	Brief amicus curiae of Current and Former Members of Congress filed.
Mar 28 2013	Brief amici curiae of Casey Family Programs, et al. filed. (Distributed)
Mar 28 2013	Brief amici curiae of Association of American Indian Affairs, et al. filed. (Distributed)
Mar 28 2013	Brief amicus curiae of The Seminole Nation of Oklahoma filed. (Distributed)
Mar 28 2013	Brief amici curiae of Inter Tribal Council of Arizona, et al. filed. (Distributed)
Mar 28 2013	Brief amici curiae of Family Law professors filed. (Distributed)
Mar 28 2013	Brief amici curiae of Tanana Chiefs Conference, et al. filed. (Distributed)
Mar 28 2013	Brief amici curiae of Arizona, et al. filed. (Distributed)
Mar 28 2013	Brief amicus curiae of Oklahoma Indian Child Welfare Association filed. (Distributed)
Mar 28 2013	Brief amici curiae of Minnesota Department of Human Services and Minnesota Ombudsperson for American Indian Families filed. (Distributed)
Mar 28 2013	Brief amici curiae of Wisconsin Tribes filed. (Distributed)
Mar 28 2013	Brief amici curiae of 63 California Indian Tribes filed. (Distributed)
Mar 28 2013	Brief amicus curiae of National Native American Bar Association filed. (Distributed)
Mar 28 2013	Brief amici curiae of Adult Pre-ICWA Indian Adoptees filed. (Distributed)
Mar 28 2013	Brief amici curiae of American Civil Liberties Union, and ACLU of South Carolina filed. (Distributed)
Apr 1 2013	Renewed motion of petitioners for leave to file the joint appendix under seal with redacted copies for the public record GRANTED.
Apr 1 2013	Upon consideration of the motions for leave to participate in oral argument as amicus curiae and the motions for divided argument, the time is to be divided as follows: 20 minutes for petitioners, 10 minutes for respondent Guardian ad Litem, 20 minutes for respondent Birth Father, and 10 minutes for the Solicitor General.
Apr 9 2013	Reply of petitioner Adoptive Couple filed. (Distributed)
Apr 9 2013	Reply of respondent Guardian ad Litem, as representative of respondent Baby Girl, supporting reversal filed. (Distributed)
Apr 16 2013	Argued. For petitioner: Lisa S. Blatt, Washington, D. C. For respondent Guardian ad Litem in support of petitioner: Paul D. Clement, Washington, D. C. For respondents Birth Father, et al.: Charles A. Rothfeld, Washington, D. C., and Edwin S. Kneedler, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

RECORD AND BRIEFS

12 399

Supreme Court, U.S.
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Respondents.

On Petition for a Writ of Certiorari to the South Carolina Supreme Court

PETITION FOR A WRIT OF CERTIORARI

[APPENDIX REDACTED]

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QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63, applies to state custody proceedings involving an Indian child. A dozen state courts of last resort are openly and intractably divided on two critical questions involving the administration of ICWA in thousands of custody disputes each year:

(1) Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

(2) Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 731 S.E.2d 550 (S.C. 2012). App. 1a. The decision of the South Carolina family court is unpublished. *Id.* at 103a.

JURISDICTION

The South Carolina Supreme Court affirmed the decision of the family court on July 26, 2012. Petitioners timely filed a petition for rehearing on August 9, 2012, which the court denied on August 22, 2012. App. 132a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 1903(9) of Title 25, U.S.C., states: "'parent' means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established."

Section 1912(f) of Title 25, U.S.C., states: "No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."

STATEMENT

With a "heavy heart," a bare majority of the South Carolina Supreme Court ordered petitioners to surrender custody of the two-year-old daughter they had raised since birth, even though petitioners were "ideal parents who have exhibited the ability to provide a loving family environment." App. 40a. The court granted custody to the child's biological father who had voluntarily relinquished his parental rights via text message while the mother was pregnant. *Id.* at 4a. Such a tragic result, the South Carolina court reasoned, was mandated by "the dictates of federal Indian law," *id.* at 40a—namely, the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-63. ICWA thus preempted state law under which petitioners' adoption of the child would have been approved.

ICWA would *not* have "dictated" this outcome, however, in at least eleven other states with a collective population of two million Native Americans. Courts in seven states have held that ICWA does not bar courts from terminating the parental rights of a non-custodial father under state law when the father abandoned his child to the sole custody of a non-Indian mother. Courts in four other states have held that an unwed, putative father must comply with state law rules to attain legal status as a "parent" under ICWA. State courts across the country have wrestled openly for decades over the meaning and operation of ICWA, and the result is two acknowledged splits on issues central to the decision below. These issues are at the heart of the administration of ICWA. And these issues potentially impact thousands of child custody cases *annually* involving Indian children with unwed, mixed-race parents.

The dissenting justices aptly described the South Carolina Supreme Court's decision a "human tragedy." App. 101a (Hearn, J., dissenting). They explained that the decision wrongly "decides the fate of a child without regard to *her* best interests and welfare." *Id.* at 41a (Kittredge, J., dissenting). Few issues have greater importance to the lives of U.S. citizens than the rights that attach to parenthood. And few issues are of greater importance than an individual's decision to raise a child. The application of ICWA in this and countless similar cases has disrupted the lives of children, their parents, extended families, the adoptive parents, and others affected by child custody and adoption proceedings. The decision below also sends a chilling message to any couple wishing to adopt a child of Native American descent. Because cases under ICWA come up through the state family court system, this Court is the only federal court in a

position to interpret this federal statute and provide much-needed clarity in an area of law where the need for clear rules is paramount.

A. Statutory Framework

Congress passed ICWA in 1978 to reduce "harm to Indian parents and their children who were *involuntarily* separated by decisions of local welfare authorities." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989) (emphasis added). Recognizing that a "high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies," 25 U.S.C. § 1901(4), Congress established "minimum Federal standards for the removal of Indian children," *id.* § 1902. ICWA thus represents a rare entry by the federal government into substantive family law, which has long been the exclusive domain of state law. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.") (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

The substantive provisions of ICWA apply to state child custody proceedings involving an "Indian child." The Act defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). Congress did not, however, extend federal rights under ICWA to all biological parents of Indian children. To the contrary, Congress excluded from the definition of "parent" "the unwed father where paternity has not been acknowledged or established." 25

U.S.C. § 1903(9). That provision reflects the principle that "the rights of the parents are a counterpart of the responsibilities they have assumed." *Lehr v. Robertson*, 463 U.S. 248, 257 (1983).

A state court may not terminate a "parent's" custody rights under ICWA without consent unless it determines "beyond a reasonable doubt" that the "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). Thus, in order to finalize an adoption of an Indian child removed from the "continued custody" of her parent, state courts must apply this high federal standard in lieu of any contrary state law.

B. Factual Background

Baby Girl was born on September 15, 2009. App. 2a. Her biological parents ("Mother" and "Father") were engaged to be married when Baby Girl was conceived, but were not living together. *Id.* at 2a, 4a. At that time, Father, who is a registered member of the Cherokee Nation, *id.* at 10a, was actively serving in the military and was stationed at Fort Sill, Oklahoma. *Id.* at 3a. After learning of the pregnancy in January 2009, Father refused to provide any financial support until he and Mother were married. *Id.* As the parents' relationship strained over the following months, Father "wanted nothing to do with the pregnancy and related responsibilities." *Id.* at 45a (Kittredge, J., dissenting). He did not "accompany her to any doctor's visits, even though he admitted he was capable of doing so." *Id.* In June 2009, Father expressly renounced his parental rights in a text message to Mother. *Id.* at 4a. Thereafter, he made no attempt to contact or support Mother during her pregnancy, and he sought no contact with

his child in the months after her birth, despite knowing that Baby Girl would be born the first week of September. *Id.* at 8a.

As a single mother with two other children, Mother decided to place Baby Girl for adoption after Father abandoned his parental rights. *Id.* at 4a. The Nightlight Christian Adoptions Agency in Oklahoma introduced Mother to petitioners ("Adoptive Parents"), who reside in Charleston, S.C., and who decided to pursue adoption after seven unsuccessful attempts at in vitro fertilization. *Id.* at 46a (Kittredge, J., dissenting). Adoptive Mother has a Ph.D. in developmental psychology and develops therapy programs for children with behavior problems and their families. *Id.* at 5a. Adoptive Father is an automotive body technician with Boeing. *Id.*

In the weeks leading up to Baby Girl's birth, petitioners spoke to Mother weekly, and Adoptive Mother traveled to visit her in Oklahoma in August 2009. *Id.* Petitioners financially supported Mother during the final months of her pregnancy and shortly after Baby Girl's birth. *Id.* Petitioners were in the delivery room when Mother gave birth to Baby Girl. *Id.* at 7a. Adoptive Father cut the umbilical cord. *Id.* The next morning, Mother signed forms relinquishing her parental rights and consenting to the adoption. *Id.*

Adoptive Parents initiated adoption proceedings on September 18, 2009, and returned to South Carolina with their new daughter eight days after the birth. *Id.* at 7a-8a. Because Father had evaded all involvement in the pregnancy and "knowingly abandoned his parental responsibilities in every respect," *id.* at 52a (Kittredge, J., dissenting), he did not learn that Baby Girl was placed for adoption until January 6, 2010, when he was served with petition-

ers' adoption complaint. *Id.* at 8a, 49a (Kittredge, J., dissenting). On January 11, 2010, Father requested a stay of the South Carolina adoption proceedings. *Id.* at 9a. At that time, Baby Girl was four months old, and Father had not sought any contact with his daughter whatsoever. *Id.* at 8a.

C. Proceedings Below

1. The adoption proceeding was tried before a South Carolina family court in September 2011, at which point Baby Girl had been living with her Adoptive Parents for two years. *Id.* at 10a. The child's guardian *ad litem* recommended that Father's parental rights be terminated and that the adoption be approved in the best interests of the child. *Id.* at 51a (Kittredge, J., dissenting). Mother also urged the court to finalize the adoption. *Id.* at 46a (Kittredge, J., dissenting). The Cherokee Nation, which had intervened, opposed the adoption. *Id.* at 10a.

The family court denied the adoption petition and transferred custody of Baby Girl to Father. *Id.* at 11a. The court reasoned that ICWA's parental termination provision, 25 U.S.C. § 1912(f), applied to block the adoption, notwithstanding the fact that Father never had custody of the child and that Baby Girl was voluntarily placed for adoption by her non-Indian parent. App. 11a. Moreover, the court held that the South Carolina law setting forth whose consent is required for adoption, S.C. Code § 63-9-310(A)(5), was irrelevant for purposes of determining the parental status of an unwed father under ICWA. App. 21a-22a. The court acknowledged that the different treatment of unwed fathers under state law and that court's view of federal law was critical to the case. *Id.* at 22a. Thus, there was no dispute that the application of state law would have led to the approval of

the adoption and the termination of Father's parental rights.

The court held that Father was a "parent" for purposes of ICWA because Father had acknowledged and established his paternity through court-ordered DNA testing. *Id.* at 22a. The court found it irrelevant that Father had forfeited his parental rights to the child, *id.*, the factor that would have been dispositive under state law in Adoptive Parents' favor.

The family court ordered Adoptive Parents to surrender their daughter to Father on December 28, 2011. *Id.* at 11a. Days after Christmas, Adoptive Parents handed Baby Girl over to Father as ordered. *Id.*

2. A sharply divided panel of the South Carolina Supreme Court affirmed the decision of the family court. *Id.* at 1a-40a. The majority summarily dismissed the position—adopted as long-settled principle by three state courts of last resort—that ICWA's parental termination provision does not apply to the voluntary adoption of an illegitimate Indian child under the sole custody of a non-Indian parent (known as the "existing Indian family doctrine"). *Id.* at 17a-18a n.17. The majority reasoned that such an analysis "conflicts with the express purpose of the ICWA." *Id.*

The majority also held that Father was a "parent" under Section 1903(9) of ICWA and thus could invoke the special parental termination provision under Section 1912(f) applicable only to parents of Indian children. *Id.* at 21a-22a n.19. The majority reached that conclusion despite acknowledging that "[u]nder state

law, Father's consent to the adoption would not have been required." *Id.* The court thus held that the biological father's "lack of interest in or support for Baby Girl during the pregnancy and first four months of her life as a basis for terminat[ing] his rights as a parent is not a valid consideration under the ICWA." *Id.* at 32a n.26. The majority then affirmed the family court's finding that Father's prospective custody of Baby Girl was required by 25 U.S.C. § 1912(f). *Id.* at 25a-26a. The court upheld the family court's order transferring Baby Girl to the custody of the biological father. *Id.* at 40a.

The dissenting justices criticized "the majority's approach of applying ICWA in a rigid, formulaic manner without regard to the facts of the particular case and the best interests of the Indian child." *Id.* at 54a-55a (Kittredge, J., dissenting). The dissenting justices found compelling justification to terminate Father's parental rights under the heightened restrictions of ICWA, and would have "require[d] the immediate return of Baby Girl to [Adoptive Parents]." *Id.* at 100a.

On August 22, 2012, the South Carolina Supreme Court, by a vote of 3-2, denied petitioners' request for rehearing. *Id.* at 132a.

REASONS FOR GRANTING THE PETITION

The highest court in South Carolina held that ICWA's parental termination provision, 25 U.S.C. § 1912(f), applies in the commonly recurring circumstance where a child is voluntarily placed for adoption by a non-Indian parent with sole custody over the child. That decision deepens an entrenched split among appellate courts in more than twenty states, including twelve courts of last resort. Likewise, the

court's determination that Father was a "parent" under ICWA splits with at least five other states, including two state supreme courts. The states implicated by these splits represent over two-thirds of the nation's Indian population.

These acknowledged divisions—involving over half of the country—lead to intolerable uncertainty in an area of law where certainty is needed most: adoption and custody proceedings that involve children. As the Utah Supreme Court recently observed, these child custody cases are "complicated by the fact that, since the ICWA was adopted in 1978, courts have struggled to apply it, often reaching inconsistent conclusions about the meaning of various terms. Despite these conflicts among the states, . . . the United States Supreme Court has issued only one decision interpreting the ICWA in the thirty years since it became effective." *State ex rel. C.D.*, 200 P.3d 194, 197 (Utah 2008).

This uncertainty spawns litigation that permanently and tragically disrupts established family units. The tragedy is exemplified by the facts of this case, which unfortunately recur with significant frequency. Division in state courts' application of ICWA not only significantly infringes on the fundamental rights of individuals. The division also significantly undermines each state's ability to effectuate its domestic relation laws. Those state laws protect a child's best interests, further the social values of the state, and provide for stability and permanency in this sensitive area. Only this Court can resolve two outstanding issues central to the applicability and administration of a federal statute that impacts thousands of custody cases and countless individuals affected by those proceedings.

I. STATE COURTS ARE INTRACTABLY SPLIT ON TWO ISSUES AT THE HEART OF ICWA

A. State Courts Are Divided Over Whether ICWA Applies When a Non-Indian Parent Voluntarily Places Her Child for Adoption

To terminate a parent's rights under ICWA, a court must find "evidence beyond a reasonable doubt . . . that the *continued* custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f) (emphasis added). More than twenty state courts are openly and intractably divided over whether this provision applies at all to the "familiar fact pattern"[1] presented in this case: "the voluntary relinquishment of an illegitimate Indian child by its non-Indian mother." *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990).

Three appellate courts of last resort and four intermediate appellate courts in other states have held that ICWA applies only when a child is being removed from the *existing* custody of an Indian parent. Courts have rested that conclusion on both the Act's text and purpose. *See, e.g., In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988). As the Supreme Court of Indiana explained, "where the child was abandoned to the adoptive [parents] essentially at the earliest practical moment after childbirth and initial hospital care, we cannot discern

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[1] Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587, 635 (2002) (discussing *S.A. v. E.J.P.*, *infra*, and similar cases).

how the subsequent adoption proceeding constituted a 'breakup of the Indian family'" that ICWA was designed to prevent. *Id.* Courts have labeled this analysis the "existing Indian family doctrine," *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996), and appellate courts in Alabama, Kentucky, Louisiana, Missouri, Nevada, and Tennessee have all reached the same conclusion. *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995); *In re S.A.M.*, 703 S.W.2d 603, 609 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *5 (Tenn. Ct. App. Apr. 27, 2009). Courts in California, Oklahoma, and Washington also adopted the existing Indian family doctrine, but the legislatures in those states enacted laws to supersede the results reached by the courts. *See In re Beach*, 246 P.3d 845, 848 (Wash. Ct. App. 2011); Wash. Rev. Code §§ 13.34.040[3], 26.10.034[1], 26.33.040[1]; *In re Baby Boy L.*, 103 P.3d 1099, 1105 (Okla. 2004); Okla. Stat. §§ 40.1, 40.3; Cal. Welf. & Insts. Code § 360.6.

In contrast, the South Carolina Supreme Court sided with appellate courts in fourteen other states that have rejected the existing Indian family doctrine and have held that ICWA's parental termination provision applies to the facts presented here. App. 17a-18a n.17. The state supreme courts of Alaska, Idaho, Kansas, Montana, New Jersey, North Dakota, and South Dakota have concluded that ICWA applies to adoption proceedings even when the child never lived—and never would have lived—as part of an Indian family. *In re Adoption of T.N.F.*, 781 P.2d 973, 978 (Alaska 1989); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re A.J.S.*, 204 P.3d 543,

547 (Kan. 2009); *In re Adoption of Riffle*, 922 P.2d 510, 515 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990). Intermediate appellate courts in seven additional states have adopted the same interpretation of ICWA. *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 964 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re Adoption of S.S.*, 622 N.E.2d 832, 840 (Ill. App. Ct. 1993), *rev'd on other grounds*, 167 Ill. 2d 250 (Ill. 1995); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 324 (N.Y. App. Div. 2005); *Quinn v. Walters*, 845 P.2d 206, 208 (Or. Ct. App. 1993), *rev'd on other grounds*, 881 P.2d 795 (Or. 1994); *State ex rel. D.A.C.*, 933 P.2d 993, 998 (Utah Ct. App. 1997).

The state courts have acknowledged that "sister states are significantly split," *State ex rel. D.A.C.*, 933 P.2d at 998, and "sharply divided as to the propriety of" applying ICWA to the recurring fact pattern of adoptions voluntarily initiated by non-Indian mothers. *In re Adoption of S.S.*, 622 N.E.2d at 834; *see also In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 683 (Cal. Ct. App. 1996) ("There is a split on this issue, both nationally and in California."). Those noting the split also have commented that this Court has yet to resolve the conflict. *In re Baby Boy L.*, 103 P.3d at 1106 n.21 ("[A]lthough the United States Supreme Court has yet to decide the issue, a split of authority exists."); *In re A.J.S.*, 204 P.3d at 547-49 (observing that "the United States Supreme Court has not addressed the issue before us" and cataloging the split among state courts).

The division among state courts has become more deeply entrenched in recent years. In 2009, the Tennessee Court of Appeals held that ICWA was not applicable to parental termination proceedings involving voluntary adoptions initiated by a non-Indian parent, *In re K.L.D.R.*, 2009 WL 1138130, at *5, while the Kansas Supreme Court reached the opposite conclusion. *In re A.J.S.*, 204 P.3d at 547-49 (considering the split among states and reversing a prior decision of the Kansas Supreme Court).

The Court should grant review to resolve this deeply embedded split among state courts, which has been called "[o]ne of the most problematic inconsistencies in state court decisions regarding the ICWA's application . . . which, since 1982, has been the center of both judicial and scholarly controversy." Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 Santa Clara L. Rev. 419, 427-28 (1998); *id.* at 428 n.59 (finding it "difficult to keep an accurate tally since new states come into the controversy each year and sometimes a state changes its position"). Only this Court can resolve the split over the meaning of ICWA that has divided the state courts.

This case presents an ideal vehicle to resolve the conflict. The application of the existing Indian family doctrine is dispositive to the outcome of this case. Thus, Adoptive Parents would have prevailed in all of the seven states that have embraced the doctrine. And, unlike many family court disputes, the material facts are uncontested. Given the typicality of Baby Girl's status as a child born to unmarried, mixed-race parents, a clear resolution will help guide the dozens of state courts that are hopelessly divided over the

meaning and application of ICWA to the recurring fact pattern presented in this case.[2]

B. State Courts Are Divided Over the Meaning of "Parent" under ICWA with Respect to Unwed Fathers

Congress excluded from ICWA's definition of "parent" unwed fathers "where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). The federal law is silent, however, regarding the steps unwed fathers must take to sufficiently "acknowledge" or "establish" paternity. State courts—including those states with the largest Indian populations—are deeply divided on the meaning of this silence.

Appellate courts of last resort in two states and intermediate appellate courts in three additional states have concluded that ICWA does not create parental rights for unwed fathers that do not otherwise exist. Thus, a putative father's parental status under ICWA is contingent upon compliance with state paternity laws in California, Oklahoma, Missouri, New Jersey, and Texas. *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059,

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[2] As the state court observed (App. 13a, 20a-21a n.18), ICWA applies to any "child custody proceeding" involving an "Indian child." 25 U.S.C. § 1903(1), (4). The court blocked the adoption, however, based on Sections 1912(f) and 1912(d). App. 25a-33a. Those provisions would not apply under either the existing Indian family doctrine or to an unwed father who does not meet the definition of parent in Section 1903(9). The decision below also discussed ICWA's adoptive placement provision, 25 U.S.C. § 1915(a). App. 37a-39a. But that provision is irrelevant in this case because no party other than Father and petitioners has sought custody of Baby Girl.

1064 (Okla. 1985), *overruled on other grounds In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Cal. Ct. App. 2003) ("[B]ecause the ICWA does not provide a standard for the acknowledgment or establishment of paternity, courts have resolved the issue under state law."); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. Ct. 1995); *In re S.A.M.*, 703 S.W.2d 603, 607 n.4 (Mo. Ct. App. 1986).[3]

In contrast, the South Carolina Supreme Court rejected the argument that "ICWA defers to state law" on the steps a putative father must undertake to preserve his paternal rights. App. 21a-22a. As a result, the court concluded that Father was a "parent" for purposes of ICWA, even though "[u]nder state law, [his] consent to the adoption would not have been required." *Id.* 21a-22a n.19. In so holding, South Carolina joined the Alaska Supreme Court and an Arizona court of appeals, which likewise have held that ICWA's definition of "parent" does not require compliance with state laws for establishing or acknowledging paternity. *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) ("We hold that even though Bruce did not comply with the Alaska legitimation statute . . ., he sufficiently acknowledged paternity of Timothy to invoke the application of ICWA."); *Jared P. v. Glade T.*, 209 P.3d 157, 160-61 (Ariz. Ct. App. 2009); *see also Michael J., Jr. v. Michael J., Sr.*, 7 P.3d

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[3] The Tennessee Court of Appeals quoted approvingly the holding of the Oklahoma Supreme Court in *Baby Boy D* that an unwed father must "acknowledge[] or establish[] [paternity] through the procedures available through the tribal courts, consistent with tribal customs, or through procedures established by state law." *In re Morgan*, 02A01-9608-CH-00206, 1997 WL 716880, at *7 (Tenn. Ct. App. Nov. 19, 1997).

960, 963 (Ariz. Ct. App. 2000) (state law requirements for establishing or acknowledging paternity "are not required" under ICWA).

This is not a split that should be permitted to percolate among other state courts. The states divided over ICWA's definition of "parent" include the four states with the largest Indian populations: California, Oklahoma, Arizona, and Texas, which collectively account for 36% of the nation's Indian population. U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* (Jan. 2012), pp. 6-7. The split also includes Alaska, which has the largest population of Native Alaskans, *see* 25 U.S.C. § 1903(3), and South Carolina, which experienced the fourth-highest percentage increase in Indian population since 2000. Census, *supra*, at 7-8. Even a two-state split on an issue of such importance to the administration of ICWA would warrant this Court's review. The fact that nearly half of the Indian population is already affected by the split only heightens the need for resolution by this Court.

As with the first question presented, this case presents an ideal vehicle for the Court to resolve this split. The court below acknowledged that had it found state law to be controlling on the question of paternity—as would be the case in New Jersey and four other states—the Adoptive Parents would have prevailed. App. 21a-22a n.19.

II. THE QUESTIONS PRESENTED IN THIS CASE ARE CRITICAL TO A LARGE AND GROWING NUMBER OF INDIVIDUALS

This case presents two recurring and important issues with profound, life-altering implications for the families and children involved. Unless this Court

grants review, thousands of adoption proceedings involving Indian children will lack equivalence and predictability—undermining the very need for uniformity and clarity that motivated Congress to enact ICWA three decades ago. Congress passed ICWA to protect against the involuntary breakup of tribal families based on prejudice. Yet the division in the state courts over the administration of ICWA concerns a set of facts that is both on the rise and is far-removed from the concerns of the Congress that passed the Act. Given the enormity of the stakes involved, this Court should not tolerate the continued uncertainty that permeates this area of the law.

A. The birthrate of Indian children outside of marriage is 65 percent, significantly higher than the 41 percent rate in the general U.S. population. Joyce A. Martin et al., *Births: Final Data for 2009*, 60 Nat'l Vital Statistics Reports 1, 8, 46 (2011). As a result, 31,812 Indian children were born to unmarried parents in 2009. *Id.* at 46. And over 40 percent of Indian children have parents of more than one race. *See* Barbara Ann Atwood et al., Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 22 (2010). Thus, conservatively, over 10,000 Indian children were born to unmarried, mixed-race parents—just like Baby Girl—in 2009 alone.

The adoption rates for Indian children are similarly striking. In 2008, 27,457 children adopted in the United States were Indian. Nat'l Council for Adoption, Adoption Factbook V 109 (2011). Based on nationwide statistics, at least half were born to unwed Indian fathers, *see* Martin et al., *supra*, at 46, thus potentially implicating the second question presented here in over 10,000 adoption proceedings.

Moreover, an additional 10,738 children adopted in the United States were designated as half-Indian in 2008—cases that would trigger the first question presented every time the Indian parent was not in the household when adoption proceedings commenced. Adoption Factbook, *supra*, at 109.

The above statistics show the pressing need for this Court to resolve two critical questions at the heart of implementation of an important federal law. ICWA impacts thousands of adoption cases involving Indian children of unwed parents. Commentators have described the circumstances of this case as a "familiar fact pattern" in the ICWA context. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587, 635 (2002); *see* Metteer, *supra*, 38 Santa Clara L. Rev. at 429 n.72; Wendy T. Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 San Diego L. Rev. 381, 399 (1997). Because this "factual paradigm appear[s] with particular prominence," the Court's guidance is desperately needed to resolve the divisions among state courts. Atwood, *supra*, at 626; *see* Toni H. Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. Rev. 465, 479–80 (1993).

B. The fundamental rights at stake in these cases further underscore the need for immediate review. "[F]ar more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953), the right to raise children is among those liberties "essential to the orderly pursuit of happiness by free men," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *accord Hodgson v. Minnesota*, 497 U.S. 417, 447 (1990); *Stanley v.*

Illinois, 405 U.S. 645, 651 (1972); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). This Court has emphasized the fundamental interest a parent has in rearing children. *See Troxel v. Granville*, 530 U.S. 57, 72–73 (2000); *Wisconsin v. Yoder*, 406 U.S. 205, 232–34 (1972). Similarly, the right to custody and companionship of a child has occupied a special place in the Court's jurisprudence. *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 842–847 (1977).

The present legal uncertainty that permeates child adoption proceedings under ICWA is unfair to the parents and children involved and clearly merits this Court's attention. Only this Court can definitively resolve the division in the state courts over the two interpretive questions under ICWA. The fact that ICWA cases are triggered by the race and ethnicity of the participants only underscores the need for this Court's interpretation of federal law. But for Father's ancestry, Baby Girl would still be living in South Carolina with her Adoptive Parents.

The South Carolina Supreme Court's application of ICWA in this case also intrudes into a realm that has from the country's founding been the province of the states. Domestic relations is a core exercise of the state's police power. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Hisquierdo*, 439 U.S. at 581 (quoting *In re Burrus*, 136 U.S. at 593-94). As discussed, the state supreme court's interpretation of ICWA preempted South Carolina's custody laws that would have permitted the adoption based on Father's abandonment of Baby Girl. This Court has exercised special care to ensure a proper balance in federal-

state relations to protect our constitutional structure and the liberty of the citizenry. *E.g., Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). The significant federalism principles raised by the decision below further counsel for this Court's review in this case.

III. THE DECISION BELOW IS WRONG

The South Carolina Supreme Court's interpretation of ICWA was wrong with respect to both questions presented.

A. The court erred on the threshold question of Father's parental status. ICWA defines "parent" to include a biological father but specifically excludes "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). That definition is best read as incorporating a state's definition of parenthood for unwed biological fathers.

This Court long has recognized that a putative father's legal status as a "parent"—and the corresponding rights and obligations that accompany that designation—requires more than "the mere existence of a biological link." *Lehr*, 463 U.S. at 261. "Notably, a biological parent is not necessarily a child's parent under law." *Astrue v. Capato*, 132 S. Ct. 2021, 2030 (2012). Because "[t]he intangible fibers that connect a parent and child have infinite variety," *Lehr*, 463 U.S. at 256, Congress has left the legal determination of parenthood for unwed fathers to the "unique attributes" of state law. *Id.* at n.11.

These principles emanate from *Stanley v. Illinois*, 405 U.S. 645 (1972), in which the Court held that a blanket denial of parental rights to all unwed fathers regardless of their fitness as parents violates due process. In a series of cases over the following

decade, the Court considered various circumstances under which a state could deny an unwed father parental status. *See In re Adoption of a Child of Indian Heritage*, 543 A.2d at 934. The Court has held that "states may constitutionally deny an unwed father parental status unless and until he manifests an interest in developing a relationship with that child, provided that the qualifications for establishing such rights are not beyond the control of an interested putative father to satisfy." *Id.* (citing *Lehr*, 463 U.S. at 264).

Congress enacted ICWA's reference to unwed fathers in the definition of "parent" against the backdrop of *Stanley*. H.R. Rep. No. 95-1386, at 21 (1978), 1978 U.S.C.C.A.N. 7530, 7543 (the definition of "parent" in ICWA "is not meant to conflict with the decision of the Supreme Court in *Stanley*"). Congress thus intended that parenthood for unwed fathers would be limited to those who showed the requisite support under state law. ICWA does not set forth any procedures by which an unwed father must sufficiently "acknowledge" or "establish" paternity to preserve his parental rights. *Supra* p. 15; *see In re Adoption of a Child of Indian Heritage*, 543 A.2d at 935 ("In light of [the development of the law after *Stanley*], and the failure of either the Act or its interpretive regulations to prescribe or define a particular method of acknowledging or establishing paternity, we infer a legislative intent to have the acknowledgment or establishment of paternity determined by state law."). After *Stanley*, states developed a variety of tests for that very purpose. For example, ten states have enacted the Uniform Parentage Act. That act includes detailed, concrete steps an unwed father must undertake *before* he enjoys a rebuttable presumption of paternity or is adjudicated

to be a "parent." *See* Uniform Parentage Act (2002), arts. 3, 6, available at http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf.

South Carolina law in effect defines parenthood by specifying the circumstances in which an unwed biological father's consent is required to proceed with an adoption that takes place within six months of a child's birth. S.C. Code § 63-9-310(A)(5). If the biological father does not satisfy the criteria of that law, he forfeits the right to object to an adoption initiated by the mother. The provision applicable here states that the consent of an unwed father is *not* required unless: "(a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses." *Id.*

The South Carolina Supreme Court acknowledged that Father did not satisfy either prong of this test. App. 21a-22a n.19. Thus, "[u]nder state law, Father's consent to the adoption would not have been required," *id.*, and his parental rights "would be terminated under state law without further inquiry," *id.* That should have been the end of the case, and federal law should not have intervened to wrench Baby Girl from the only home she had ever known.

After acknowledging that Father's financial and emotional abandonment of Baby Girl barred him

from being a parent under state law, the court below badly misread ICWA to create parental rights in an unwed father that do not otherwise exist. That approach conflicts with this Court's decisions that look to *state* laws defining parental status when interpreting the applicability of federal rights. For example, the meaning of "parent" under the Social Security Act "is quite clear: Congress must have meant by the term 'parent' an individual who owed to the child a *state-imposed* legal duty of support." *King v. Smith*, 392 U.S. 309, 329 (1968) (emphasis added). Likewise, state law determines whether a non-custodial parent has standing to represent his child's constitutional rights. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004) ("Newdow's parental status is defined by California's domestic relations law."); *see also De Sylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) ("The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship . . . . We think it proper, therefore, to draw on the ready-made body of state law to define the meaning of the word 'children' in § 24 [of the Copyright Act].").

So, too, under ICWA state law determines whether an unwed father has taken the necessary steps to acknowledge or establish his paternity. With ICWA, Congress did not intend to create a new federal class of "parents"; rather, Congress sought only to preserve existing rights of unwed fathers already recognized as "parents" under traditional state law.

B. Even if the South Carolina Supreme Court correctly held that Baby Girl's biological father was a

"parent" under ICWA, the court separately erred in holding that ICWA's parental termination provision, 25 U.S.C. § 1912(f), can be used by a *non*-custodial Indian parent to block an otherwise voluntary adoption. Section 1912(f), which by its terms addresses only "*continued* custody," is inapplicable when the parent at issue lacks *prior* custody of the child. *See In re Morgan*, 02A01-9608-CH-00206, 1997 WL 716880, at *8 (Tenn. Ct. App. Nov. 19, 1997) ("[A]pplication of this section . . . seems inappropriate where neither the Mother nor the putative father ever had custody of the child.").

This limitation on the scope of ICWA is reinforced by the Act's express purpose: to establish "minimum Federal standards for the *removal* of Indian children from their families," 25 U.S.C. § 1902 (emphasis added), and to prevent Indian families from being "*broken up* by the removal, often unwarranted, of their children . . . by nontribal public and private agencies," *id.* § 1901(4) (emphasis added). *See also id.* § 1912(d) (requiring provision of "remedial services . . . designed to prevent the breakup of the Indian family"). Here, no Indian family is being "broken up" and no Indian child is being "removed" from the custody of her parents. Section 1912(f) thus does not apply. *In re Adoption of T.R.M.*, 525 N.E.2d at 302-03 ("ICWA should not be applied to the present case in which the purpose and intent of Congress cannot be achieved thereby."); *Rye*, 934 S.W.2d at 263 ("ICWA was never meant to apply in those cases . . . where the Indian children had lived with their non-Indian mothers."); *Hampton*, 658 So. 2d at 334-35 ("[U]pon exhaustive review of jurisprudence on this issue, the Act and its stated purpose and legislative history, we are convinced that Congress intended the Act apply only in situations involving

the removal of children from an existing Indian family and Indian environment.").

C. Equal protection principles also undermine the state court's interpretation of ICWA. This Court has sanctioned preferential treatment for Native Americans where the differentiation is a consequence of Indians' unique *sovereign* status. *Morton v. Mancari*, 417 U.S. 535, 553 (1974). But discriminatory treatment predicated on "ancestral" classification otherwise runs afoul of equal protection principles. *Rice v. Cayetano*, 528 U.S. 495, 514 (2000). The South Carolina Supreme Court's application of ICWA in these circumstances raises a serious constitutional question whether a biological father can invoke preferential custodial rights based on his blood heritage. The existing Indian family doctrine, by focusing on connections to tribal culture and sovereignty, prevents ICWA from devolving into a race-based preference for Native Americans. *See In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715 (Cal. Ct. App. 2001) ("To address situations in which application of the ICWA is unwarranted or unconstitutional, courts have . . . declined to apply the ICWA to situations in which a child is not being removed from an existing Indian family."); *see also In re Alexandria Y.*, 53 Cal. Rptr. 2d at 686 (noting "serious constitutional flaws in the ICWA" under principles of due process, equal protection, and the Tenth Amendment); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 516 (Cal. Ct. App. 1996) (limiting ICWA to avoid violating "the Fifth, Tenth, and Fourteenth Amendments to the United States Constitution").

At a minimum, given the magnitude of the stakes impacting thousands of families and the division

among state courts, this Court should grant the petition and consider the case on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ADOPTIVE COUPLE,
Appellants,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,
Respondents.

Appeal from Charleston County
The Hon. Deborah Malphrus, Family Court Judge

Opinion No. 27148
Heard April 17, 2012 - Filed July 26, 2012

AFFIRMED

Mark D. Fiddler, of Minneapolis, Minnesota, Raymond W. Godwin and Julie M. Rau, both of Greenville, and Robert Norris Hill, of Newberry, all for Appellants.

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, of Columbia, Lesley Ann Sasser and Shannon Phillips Jones, both of Charleston, all for Respondent, Birth Father.

Chrissi R. Nimmo, of Tahlequah, Oklahoma, for Respondent, Cherokee Nation.

James Fletcher Thompson, of Spartanburg, and Philip McCarthy, of Flagstaff, Arizona, for Amicus Curiae, the American Academy of Adoption Attorneys.

Dione Cherie Carroll, of Miami, Florida, for Amici Curiae, the Catawba Indian Nation, the North American Council on Adoptable Children, the Child Welfare League of America, the National Indian Child Welfare Association, and the Association on American Indian Affairs.

Thomas P. Lowndes, Jr., of Charleston, for the Guardian *ad Litem*.

CHIEF JUSTICE TOAL: This case involves a contest over the private adoption of a child born in Oklahoma to unwed parents, one of whom is a member of the Cherokee Nation. After a four day hearing in September 2011, the family court issued a final order on November 25, 2011, denying the adoption and requiring the adoptive parents to transfer the child to her biological father. The transfer of custody took place in Charleston, South Carolina, on December 31, 2011, and the child now resides with her biological father and his parents in Oklahoma. We affirm the decision of the family court denying the adoption and awarding custody to the biological father.

FACTS/PROCEDURAL HISTORY

Father and Mother are the biological parents of a child born in Oklahoma on September 15, 2009 ("Baby Girl"). Father and Mother became engaged to be married in December 2008, and Mother informed

Father that she was pregnant in January 2009.[1] At the time Mother became pregnant, Father was actively serving in the United States Army and stationed at Fort Sill, Oklahoma, approximately four hours away from his hometown of Bartlesville, Oklahoma, where his parents and Mother resided.[2] Upon learning Mother was pregnant, Father began pressing Mother to get married sooner.[3] The couple continued to speak by phone daily, but by April 2009, the relationship had become strained. Mother testified she ultimately broke off the engagement in May via text message because Father was pressuring her to get married. At this point, Mother cut off all contact with Father. While Father testified his post-breakup attempts to call and text message Mother went unan-

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[1] Father has a daughter from a prior marriage whom he supports through a deduction in his military pay and who was six years old at the time of the engagement. Mother claims that Father has another daughter whom he does not support, but this was never substantiated by the evidence. Mother has two other children from a prior relationship.

[2] Father served honorably in both Operation Iraqi Freedom and Operation New Dawn and received a Bronze Star for his service. He is now a member of the National Guard and works as a security guard.

[3] The testimony of Mother and Father surrounding the circumstances of the parties' relationship during this time is conflicting. For example, Father testified he was "very happy" when he learned they were expecting a child and claimed he desired to get married sooner so that the child would not be born out of wedlock. On the other hand, Mother testified Father "didn't really have a reaction" and "every time [she] would bring it up, he really didn't say a whole lot," and stated Father pressured her to get married for monetary purposes because the military would increase his pay for "family living."

swered, it appears from the Record Father did not make any meaningful attempts to contact her.

It is undisputed that Mother and Father did not live together prior to the baby's birth and that Father did not support Mother financially for pregnancy related expenses, even though he had the ability to provide some degree of financial assistance to Mother.[4]

In June 2009, Mother sent a text message to Father asking if he would rather pay child support or surrender his parental rights. Father responded via text message that he would relinquish his rights, but testified that he believed he was relinquishing his rights to Mother. Father explained: "In my mind I thought that if I would do that I'd be able to give her time to think about this and possibly maybe we would get back together and continue what we had started." However, under cross-examination Father admitted that his behavior was not conducive to being a father. Mother never informed Father that she intended to place the baby up for adoption. Father insists that, had he known this, he would have never considered relinquishing his rights.

Mother testified she chose the adoption route because she already had two children by another father, and she was struggling financially. In June 2009, Mother connected with Appellants (or "Adoptive Mother" or "Adoptive Father") through the

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[4] Mother testified she asked Father for financial assistance before she made her first pre-natal doctor's appointment, and Father stated he would not assist her financially unless they were married. Father denies that Mother asked for financial assistance and testified he would have supported her if she had asked.

Nightlight Christian Adoption Agency (the "Nightlight Agency"). She testified she chose them to be the parents of the child because "[t]hey're stable . . . . they're a mother and father that live inside a home where she can look up to them and they can give her everything she needs when needed."

Appellants reside in Charleston, South Carolina, and were married on December 10, 2005. Adoptive Mother has a Master's Degree and a Ph.D. in developmental psychology and develops therapy programs for children with behavior problems and their families. Adoptive Father is an automotive body technician currently working for Boeing. They have no other children. After connecting, Mother spoke with Appellants weekly by telephone, and Adoptive Mother visited Mother in Oklahoma in August 2009. Appellants provided financial assistance to Mother during the final months of her pregnancy and after Baby Girl's birth. Adoptive Mother testified Mother consistently represented that the birth father was not involved.

Mother testified that she knew "from the beginning" that Father was a registered member of the Cherokee Nation, and that she deemed this information "important" throughout the adoption process.[5] Further, she testified she knew that if the Cherokee Nation were alerted to Baby Girl's status as an Indian child, "some things were going to come into effect, but [she] wasn't for [sic] sure what." Mother reported Father's Indian heritage on the Nightlight Agency's adoption form and testified she made

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[5] Mother testified that she believed she also had Cherokee heritage, but she was not a registered member of the Cherokee Nation.

Father's Indian heritage known to Appellants and every agency involved in the adoption. However, it appears that there were some efforts to conceal his Indian status. In fact, the pre-placement form reflects Mother's reluctance to share this information:

> Initially the birth mother did not wish to identify the father, said she wanted to keep things low-key as possible for the [Appellants], because he's registered in the Cherokee tribe. It was determined that naming him would be detrimental to the adoption.

Appellants hired an attorney to represent Mother's interests during the adoption. Mother told her attorney that Father had Cherokee Indian heritage. Based on this information, Mother's attorney wrote a letter, dated August 21, 2009, to the Child Welfare Division of the Cherokee Nation to inquire about Father's status as an enrolled Cherokee Indian. The letter stated that Father was "1/8 Cherokee, supposedly enrolled," but misspelled Father's first name as "Dust*in*" instead of "Dust*en*" and misrepresented his birthdate. (emphasis added).

Because of these inaccuracies, the Cherokee Nation responded with a letter stating that the tribe could not verify Father's membership in the tribal records, but that "[a]ny incorrect or omitted family documentation could invalidate this determination." Mother testified she told her attorney that the letter was incorrect and that Father was an enrolled member, but that she did not know his correct birthdate. Adoptive Mother testified that, because they hired an attorney to specifically inquire about the baby's Cherokee Indian status, "when she was born, we were under

the impression that she was not Cherokee."[6] Any information Appellants had about Father came from Mother.

When Mother arrived at the hospital to give birth, she requested to be placed on "strictly no report" status, meaning that if anyone called to inquire about her presence in the hospital, the hospital would report her as not admitted.[7] Mother testified that neither Father nor his parents contacted her while she was in the hospital.

Adoptive Mother and Adoptive Father were in the delivery room when Mother gave birth to Baby Girl on September 15, 2009. Adoptive Father cut the umbilical cord. The next morning, Mother signed forms relinquishing her parental rights and consenting to the adoption.

Appellants were required to receive consent from the State of Oklahoma pursuant to the Oklahoma Interstate Compact on Placement of Children ("ICPC") as a prerequisite to removing Baby Girl from that state. Mother signed the necessary documentation, which reported Baby Girl's ethnicity as "Hispanic" instead of "Native American." After Baby Girl was discharged from the hospital, Appellants remained in Oklahoma with Baby Girl for approximately eight days until they received ICPC approval, at which point they took Baby Girl to South Carolina. According to the testimony of Tiffany Dunaway, a

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[6] Adoptive Mother testified that the Nightlight Agency's preplacement report was "probably . . . something I read and didn't think twice about it."

[7] Mother testified that she chose this option in both of her previous births primarily to prevent the father from contacting her.

Child Welfare Specialist with the Cherokee Nation, had the Cherokee Nation known about Baby Girl's Native American heritage, Appellants would not have been able to remove Baby Girl from Oklahoma.[8]

Father was aware of Mother's expected due date, but made no attempt to contact or support Mother directly in the months following Baby Girl's birth.[9]

Appellants filed the adoption action in South Carolina on September 18, 2009, three days after Baby Girl's birth, but did not serve or otherwise notify Father of the adoption action until January 6, 2010, approximately four months after Baby Girl was born and days before Father was scheduled to deploy to Iraq. On that date outside of a mall near his base, a process server presented Father with legal papers entitled "Acceptance of Service and Answer of Defendant," which stated he was not contesting the adoption of Baby Girl and that he waived the thirty

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[8] Dunaway testified that had "Native American" been circled on the ICPC form, the ICPC administrator would have contacted her supervisor directly. Whether or not the Cherokee Nation would have ultimately allowed the adoption to go forward is a matter of tribal law. However, the testimony establishes the tribe would not have consented to Baby Girl's removal at that time, triggering the denial of Appellants' ICPC application, and Appellants would not have been able to transport Baby Girl to South Carolina.

[9] Father testified he asked friends and family if they had seen Mother because she would not reply to his text messages. His mother testified she attempted to contact Mother on several occasions and once left Mother a voice message before Baby Girl's birth to tell Mother she had money and some gifts for the baby, including items she hand-knitted, but Mother never returned her telephone calls. Mother testified that none of Father's family members contacted her regarding gifts for Baby Girl.

day waiting period and notice of the hearing. Father testified he believed he was relinquishing his rights to Mother and did not realize he consented to Baby Girl's adoption by another family until after he signed the papers. Upon realizing that Mother had relinquished her rights to Appellants, Father testified, "I then tried to grab the paper up. [The process server] told me that I could not grab that [sic] because . . . I would be going to jail if I was to do any harm to the paper."

After consulting with his parents and a JAG lawyer at his base, Father contacted a lawyer the next day, and on January 11, 2010, he requested a stay of the adoption proceedings under the Servicemember's Civil Relief Act ("SCRA"). On January 14, 2010, Father filed a summons and complaint in an Oklahoma district court to establish paternity, child custody, and support of Baby Girl. The complaint named Appellants and Mother as defendants.[10] Paragraph 12 of this Complaint stated, "Neither parent nor the children have Native American blood. Therefore the Federal Indian Child Welfare Act . . . and the Oklahoma Indian Child Welfare Act . . . do not apply." Father departed for Iraq on January 18, 2010, with his father acting as power of attorney while he was deployed overseas.[11]

On March 16, 2010, Appellants, with Mother joining, filed a Special Appearance and Motion to Dismiss Father's Oklahoma action on jurisdictional

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[10] Upon receipt of this complaint, Appellants were first put on notice that Father was contesting the adoption.

[11] Father did not return to the United States until December 26, 2010.

grounds. The motion was granted, thereby ending the Oklahoma custody action.

Meanwhile, in January 2010, the Cherokee Nation first identified Father as a registered member and determined that Baby Girl was an "Indian Child," as defined under the Federal Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq*. (the "ICWA"). It is not apparent from the Record when Appellants were made aware of this change, but on March 30, 2010, Appellants amended their South Carolina pleadings to acknowledge Father's membership in the Cherokee Nation. Accordingly, on April 7, 2010, the Cherokee Nation filed a Notice of Intervention in the South Carolina action.[12]

On May 6, 2010, the family court ordered paternity testing which conclusively established Father as the biological father of Baby Girl, and Appellants have since acknowledged Father's paternity. Furthermore, the family court issued an order confirming venue and jurisdiction in Charleston County Family Court and lifting the automatic stay of proceedings under the SCRA. On May 25, 2010, Father answered Appellants' amended complaint, stating he did not consent to the adoption of Baby Girl and seeking custody. By temporary order dated July 12, 2011, the family court set a hearing date for the case, and found separately that the ICWA applied to the case.

The trial of the case took place from September 12-15, 2011. A Guardian *ad Litem* ("GAL") represented

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[12] On April 19, 2010, Father filed an amended complaint that modified paragraph 12 of his previous complaint to read: "Both the father and the child have Native American blood. Therefore the Federal Indian Child Welfare Act . . . and the Oklahoma Indian Child Welfare Act . . . do apply."

the interests of Baby Girl. On November 25, 2011, the family court judge issued a Final Order, finding that: (1) the ICWA applied and it was not unconstitutional; (2) the "Existing Indian Family" doctrine was inapplicable as an exception to the application of the ICWA in this case in accordance with the clear modern trend; (3) Father did not voluntarily consent to the termination of his parental rights or the adoption; and (4) Appellants failed to prove by clear and convincing evidence that Father's parental rights should be terminated or that granting custody of Baby Girl to Father would likely result in serious emotional or physical damage to Baby Girl. Therefore, the family court denied Appellants' petition for adoption and ordered the transfer of custody of Baby Girl to Father on December 28, 2011.

Appellants filed a motion to stay the transfer and to reconsider on December 9, 2011, which the family court denied on December 14, 2011.[13] Appellants then filed a notice of appeal in the court of appeals on December 20, 2011, along with a petition for a writ of supersedeas. Judge Aphrodite Konduras temporarily granted the petition for a writ of supersedeas pending the filing of a return by Father. On December 30, 2011, Judge Konduras issued an order lifting the temporary grant of supersedeas and denying the petition for a writ of supersedeas. On December 31, 2011, Appellants transferred Baby Girl to Father, and Father and his parents immediately traveled with Baby Girl back to Oklahoma.

This Court certified the appeal pursuant to Rule 204(b), SCACR. In addition to briefs filed by the par-

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[13] The GAL also filed a motion to reconsider, which was denied.

ties, the American Academy of Adoption Attorneys, the Catawba Indian Nation, the North American Council on Adoptable Children, the Child Welfare League of America, the National Indian Child Welfare Association, and the Association on American Indian Affairs have filed briefs as amici curiae.

ISSUES

I. Whether Appellants properly transferred Baby Girl to South Carolina.

II. Whether the ICWA defers to state law in determining whether an unwed father is a "parent" as defined by the ICWA.

III. Whether Appellants proved grounds to terminate Father's parental rights under the ICWA.

STANDARD OF REVIEW

When reviewing a decision by the family court, an appellate court has the authority to find the facts in accordance with its own view of the preponderance of the evidence. *Lewis v. Lewis*, 392 S.C. 381, 384, 709 S.E.2d 650, 651 (2011). "However, this broad scope of review does not require this Court to disregard the findings of the family court" judge who is in a superior position to make credibility determinations, nor does it relieve an appellant of demonstrating the error of the family court. *Id.* at 384, 389, 709 S.E.2d at 651, 654.

LAW/ANALYSIS

I. The ICWA

This case is unique in that it involves an Indian child,[14] and thus, any child custody proceeding must be decided within the parameters of the ICWA, 25 U.S.C. § 1901-1963 (1978).

The ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1988). The evidence presented to Congress during the 1974 hearings revealed that "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Id.* (citation omitted). Moreover, "[t]he adoption rate of Indian children was eight times that of non-Indian children" and "[a]pproximately 90% of the Indian placements were in non-Indian homes." *Id.* at 33 (citation omitted). At the Congressional hearings, a Tribal Chief described the primary reason for such removal as follows:

> One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the

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[14] An "Indian Child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

> fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

Id. at 34-35 (citation and footnote omitted).[15]

Although Congress primarily sought to prevent the involuntary removal of American Indian or Alaska Native Indian children from their families and tribal communities and placement of these children into both foster care and adoptive placements, *see* 25 U.S.C. §§ 1912(e)-(f), 1915(b), it is clear that Congress was likewise concerned with the voluntary adoptions of Indian children. *See* 25 U.S.C. § 1915(a) ("In *any* adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." (emphasis added)).

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[15] For example, non-Indian state child welfare workers often mischaracterize the dynamics of the Indian extended family:

> An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

H.R. Rep. No. 1386, at 22 (1978) reprinted in 1978 U.S.C.C.A.N. 7530, 7533. At trial, the Cherokee Nation presented expert testimony that the involvement of extended family members in child-rearing is culturally unique to Cherokee Indians.

Aside from the avoidance of culturally inappropriate removal of Indian children, Congress intended the ICWA to preserve tribal sovereignty with respect to its familial affairs. In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1988), the only United States Supreme Court case addressing the ICWA, the Court determined that the Choctaw Indian Tribe had the sole authority to determine the adoptive placement of twin babies under the ICWA. In that case, both Indian parents desired to have their twin babies adopted by non-Indian parents. *Id.* In construing section 1911(a) of the ICWA, the Supreme Court stated:

> [n]or can the result be any different simply because the twins were "voluntarily surrendered" by their mother. Tribal jurisdiction under § 1911(a) was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians. The numerous prerogatives accorded the tribes through the ICWA's substantive provisions . . . must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.

Id. at 49 (internal citations and footnote omitted).[16]

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[16] While the present case does not involve section 1911(a), which grants tribes exclusive jurisdiction to determine placement of Indian children who are either domiciled on a reser-

Therefore, exercising its power under the Indian Commerce Clause of the United States Constitution, U.S. Const. art. 1, § 8, Congress passed the ICWA making, *inter alia*, these specific findings:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are

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vation or a ward of the tribe, the ICWA "lays out a dual jurisdictional scheme." *Holyfield*, 490 U.S. at 36. Therefore, in cases of children not domiciled on the reservation, section 1911(b), as noted in the *Holyfield* decision,

> creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation: on petition of either parent or the tribe, state court proceedings for foster care placement or termination of parental rights are to be transferred to the tribal court, except in cases of "good cause," objection by either parent, or declination of jurisdiction by the tribal court.

Id. In cases of concurrent jurisdiction between states and tribes, the ICWA "set[s] procedural and substantive standards for those child custody proceedings that do take place in state court." *Id.* Thus, the clear message of *Holyfield*, even though construing section 1911(a), still rings true in this child custody proceeding: the ICWA safeguards the tribe's role in child custody proceedings affecting its children and protects a tribe's strong interest in retaining its children within the tribe. *Id.* at 37.

> placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901.

Additionally, Congress declared:

> [I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Id. § 1902.[17]

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[17] Given that its policy conflicts with the express purpose of the ICWA, we take this opportunity to reject the "Existing Indian Family" doctrine (the "EIF"). *See* Note, *The Indian Childs Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Indian Child?*, 38 Cath. U. L. Rev., 511, 534 (1989) ("In light of the legislative history of the ICWA, the existing Indian family theory is thus contrary to the intent of Congress." (footnotes omitted)). The EIF is a judicially created exception to the application of the ICWA. *See In the Matter of the Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982), *overruled by In the Matter of A.J.S.*, 204 P.3d 543 (Kan. 2009) (holding the purpose of the ICWA "was not to dictate that an illegitimate infant who

Because the ICWA establishes "minimum Federal standards for the removal of Indian children from their families" and applies to any child custody proceeding involving an Indian child, *see* 25 U.S.C. §§ 1902, 1903, 1911, it is through this lens that we are constrained to decide the present controversy.

II. Transfer of Baby Girl to South Carolina

In its rendering of the facts of the case, the final order of the family court stated that if it were not for the misinformation provided to the Cherokee Nation about the birth father during the process of securing the ICPC, "[Appellants] [would not have] received permission to remove the child from Oklahoma and transport the child to their home state of South Carolina just days after her birth." This statement was neither a finding of fact nor a conclusion of law, but rather was part of the factual background provided in the order. Nevertheless, on appeal Respondents argue that South Carolina courts lack jurisdiction to determine the custody issues. In response, Appellants argue that they properly transferred Baby Girl to South Carolina, and if not, the improper transfer was forgivable or understandable. More specifically, Appellants contend the ICPC form, which did not accurately represent Baby Girl's Indian heritage, should not be construed against them because the ICPC does not protect the rights of birth

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has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother"). In so holding, we join the majority of our sister states who have rejected the EIF or have since abandoned the exception. *See In the Matter of A.J.S.*, 204 P.3d at 548-49 (listing the states that have rejected the EIF).

parents but is designed to ensure the child's safe transfer across state lines. Thus, Appellants maintain, they have satisfied the requirements of the ICPC by providing Baby Girl with a safe and loving home. Furthermore, while Appellants do not dispute that the Cherokee Nation was never informed of Baby Girl's status as an Indian child, Appellants argue that the misspelling of Father's name was an obvious mistake, which they subsequently corrected by amending their pleadings to allege Father is a Cherokee Indian.

Appellants correctly identify the purpose of the ICPC. *See Doe v. Baby Girl*, 376 S.C. 267, 284, 657 S.E.2d 455, 464 (2008) ("[W]e note the ICPC was designed to ensure that placements for children across state lines are safe; it was not designed to protect the rights of the birth parents. Certainly, there was no evidence that Baby Girl's placement with appellants had become unsafe in any way." (internal citation omitted)). However, we think Appellants' argument mischaracterizes the family court's statement. The family court did not find that Appellants violated the ICPC by *unsafely* transferring Baby Girl across state lines. Rather, Appellants' mistake when researching Father's tribal membership coupled with the subsequent omission on the ICPC form, meant that the Cherokee Nation was not properly alerted to Baby Girl's status as an Indian child; and therefore, the tribe's right to participate in Baby Girl's placement was never triggered before Appellants removed Baby Girl from Oklahoma.

While the evidence establishes Baby Girl would not be in South Carolina had the Cherokee Nation been properly noticed of her status as an Indian child, we agree with Appellants that the propriety of Baby

Girl's transfer to South Carolina was litigated in the Oklahoma action when the Oklahoma court issued an order dismissing the case on jurisdictional grounds. Appellants correctly point out that in Father's Response to Appellants' Motion to Dismiss, he argued that the ICPC request form "would not have been processed by Michael Nomura of Heritage Family Services without giving notice to the Cherokee Nation had Defendant not withheld the fact that the baby was part American Indian on the form." After considering this and other arguments, the Oklahoma court issued an order dismissing the action on jurisdictional grounds, and neither Father nor the Cherokee Nation appealed that order. Therefore, because no appeal was taken from the dismissal of the action, that decision remains the law of the case. *See Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) ("A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case.").

Because the Oklahoma court declined to exercise jurisdiction in this case, it is now incumbent on this Court to resolve the myriad issues concerning Baby Girl's final placement.

III. Father's Status as a "Parent" under the ICWA

Appellants claim Father does not have standing to invoke the protection of the ICWA because Father does not meet the ICWA's statutory definition of "parent" found in section 1903(9).[18] We disagree.

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[18] Appellants also urge this Court to conclude that the ICWA does not apply if we conclude Father is not a "parent" as defined by the ICWA. However, the ICWA's applicability stems from Baby Girl's status as an Indian child under section 1903(4). *See*

The family court found the ICWA was applicable, in that the Cherokee Nation is an "Indian Tribe," Baby Girl is an "Indian Child," and Father is a "parent" as prescribed in the ICWA. *See* 25 U.S.C. § 1903(4), (8)-(9).

The ICWA defines "parent" as

> any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *It does not include the unwed father where paternity has not been acknowledged or established.*

Id. § 1903(9) (emphasis added).

Appellants argue that unwed fathers must show more than "mere biology" to invoke the protections of the ICWA. The ICWA does not explicitly set forth a procedure for an unwed father to acknowledge or establish paternity; thus, Appellants argue that the ICWA defers to state law on this point. Relying on section 63-9-310(A)(5) of the South Carolina Code,[19]

Note, *The Indian Child Welfare Act of 1978: Does it Apply to the Adoption of an Illegitimate Indian Child?*, *supra* note 17, at 540 ("Congress clearly intends that the only prerequisite to the operation of the ICWA be the involvement of an Indian Child in a child custody proceeding."). Thus, the ICWA applies because Baby Girl is an Indian child, and whether or not this Court finds Father a "parent" has no bearing on the ICWA's applicability.

[19] That section provides that an unwed father must consent to an adoption taking place within six months of a child's birth only if:

> (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or

Appellants contend that because Father neither lived with Mother for a continuous period of six months before the child's birth, nor contributed to her pregnancy-related expenses, Father does not qualify as a "parent" under the ICWA.

In making the determination that Father was a "parent" under the ICWA, the family court focused on the distinction between the requirements for an unwed father to consent to an adoption under state law versus the requirements for an unwed father to establish paternity under the ICWA, and found the "ICWA extends *greater* rights to the unwed Indian father" than state law. (emphasis added). The family court's finding and Appellants' argument collapse the notions of paternity and consent. However, the family court ultimately concluded that Father met the ICWA's definition of "parent" by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establishing his paternity through DNA testing. We agree with the family court that, by its plain terms, this is all that is required under the ICWA. Therefore, Father is a "parent" as defined by the ICWA.

> (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

S.C. Code Ann. § 63-9-310(A)(5) (2010). Under state law, Father's consent to the adoption would not have been required.

IV. Termination of Parental Rights

Because we find Father is a "parent"[20] for purposes of the application of the ICWA, we now turn to whether Father's parental rights should be terminated. While the ICWA incorporates state law termination grounds, it also clearly mandates state courts consider heightened federal requirements to terminate parental rights as to ICWA parents.[21]

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[20] We note that Father is not afforded protection under the ICWA merely because he is an *Indian* parent. The ICWA also provides protection to non-Indian parents, so long as they are a parent of an "Indian Child" as defined by section 1903(4).

[21] We agree with the dissent that the ICWA does not operate to "oust" the states' jurisdiction to make custody determinations affecting Indian children. *See Holyfield*, 490 U.S. at 58 (citation omitted). However, in cases where state courts are considering the placement of an Indian child, the ICWA sets forth important procedural and substantive provisions that state courts *must* follow. *Id.* at 36. While state termination grounds play a part in custody proceedings under the ICWA, we believe, unlike the dissent, that state law cannot operate to frustrate the clear purposes of the ICWA, as "Congress perceived the States and their courts as partly responsible for the problem [the ICWA] intended to correct." *Id.* at 44-45. In fact, to achieve its desired goal of placing Baby Girl with Appellants, the dissent utilizes reasoning expressly rejected by the *Holyfield* court in finding that a state court could not employ state abandonment principles to sidestep the ICWA's clear mandates in order to sanction an Indian mother's attempt to avoid the ICWA's domiciliary provisions to facilitate an adoption by white parents. *See id.* at 52-53 (stating this insertion of state abandonment principles "conflicts with and undermines the operative scheme established by subsections [1911(a)] and [1913(a)] to deal with children of domiciliaries of the reservation and weakens considerably the tribe's ability to assert its interest in its children. This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this rela-

A. Voluntary Termination

While Father's consent would not have been required under South Carolina law, *see* S.C. Code Ann. § 63-9-310(A)(5), for a parent to voluntarily relinquish his or her parental rights under the ICWA, his or her

> consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

25 U.S.C. § 1913(a). Moreover, a parent may withdraw his or her consent "for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent." *Id.* § 1913(c).

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tionship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, *and the preferred forum for nondomiciliary Indian children. [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents.*" (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969-970 (1986))).

It is undisputed that the only consent document Father ever signed was a one-page "Acceptance of Service" stating he was not contesting the adoption, which was purportedly presented for Father's signature as a prerequisite to the service of a summons and complaint. Thus, Appellants did not follow the clear procedural directives of section 1913(a) in obtaining Father's consent. Moreover, even if this "consent" was valid under the statute, then Father's subsequent legal campaign to obtain custody of Baby Girl has rendered any such consent withdrawn. Therefore, neither Father's signature on the "Acceptance of Service" document, nor his stated intentions to relinquish his rights, were effectual forms of voluntary consent under the ICWA.

B. Involuntary Termination

Thus, we may only grant Appellants' adoption decree with respect to Father in the absence of his voluntary consent if Appellants can establish grounds for involuntarily terminating Father's parental rights under state law *and* the ICWA.

Under the ICWA, in addition to any state law grounds for termination, Appellants must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d). Moreover,

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence *beyond a reasonable doubt*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to

> result in serious emotional or physical damage to the child.

Id. § 1912(f) (emphasis added).

1. Active Remedial Measures

To effect termination under the ICWA, the parties seeking termination "shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. § 1912(d).

Appellants admit that the provision has not been satisfied; however, they seek to avoid the remedial measures requirement by claiming that any efforts to rehabilitate Father would be futile. We find Appellants' futility argument insufficient to override the clear mandate of section 1912(d) under these facts.

Even assuming the dissent is correct in finding that Father did not want custody of Baby Girl and did not desire to act as a parent to her, straightforward application of the language of section 1912(d) requires that remedial services be offered to address any parenting issues to prevent the breakup of the Indian family—for example, by attempting to stimulate Father's desire to be a parent or to provide necessary education regarding the role of a parent.[22]

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[22] The dissent rightly points out that, in most termination cases, the *state* initiates remedial or rehabilitative efforts after *removing* a child from parental custody. However, the dissent acknowledges that "such services may also be offered to parents proactively to prevent a child's removal in the first instance." The ICWA does not distinguish removal situations from adoptive placements. Thus, had the tribe been properly noticed of the adoption from the outset, it would have been the tribe's prerogative to take remedial measures to reunify the Indian family.

In this case, far from offering such services, Appellants—perhaps understandably, given the emotionally wrenching circumstances—have actively sought to prevent Father from obtaining custody of Baby Girl since she was four months old. Father, despite some early indications of possible lack of interest in Baby Girl, not only reversed course at an early point but has maintained that course despite this active opposition.

Therefore, a finding on these facts that the remedial measures mandated by the ICWA may be waived would be an unwarranted substitution of this Court's preferences for the clear dictates of statutory law.[23]

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[23] We note that even under South Carolina law, we do not terminate parental rights merely because a parent is not a perfect parent. *See Hooper v. Rockwell*, 334 S.C. 281, 296, 513 S.E.2d 358, 366 (1999). Thus, only where "reunification is not possible or appropriate" may a party move to terminate the parent's rights by proving a basis for termination by clear and convincing evidence. *Id.*; *see also Richland Cnty. Dep't of Soc. Servs. v. Earles*, 330 S.C. 24, 32, 496 S.E.2d 864, 868 (1998) (citing *Greenville Cnty. Dep't of Soc. Servs. v. Bowes*, 313 S.C. 188, 437 S.E.2d 107 (1993)). Our cases demonstrate that when a parent consciously refuses to support, visit, or otherwise make a suitable environment for their child, termination is appropriate, but even in extreme cases, we seek to rehabilitate the parent either by ordering them to pay support, addressing any substance abuse issues, or instituting a treatment or placement plan. *See S.C. Dep't of Soc. Servs. v. M.R.C.L.* , 393 S.C. 387, 390-95, 712 S.E.2d 452, 454-57 (2011) (terminating parental rights as to parents who tested positive for crack cocaine, failed to complete drug and alcohol testing, and refused to comply with court ordered child support); *Hooper*, 334 S.C. at 296-301, 513 S.E.2d at 366-69 (terminating parental rights based on mother's severe abuse and neglect of her child, refusal to satisfy court ordered support obligations, and failure to comply with at least twelve treatment plans designed to remedy the conditions which led to her child's removal); *Earles*, 330 S.C. at 32-34, 496 S.E.2d at

2. *Likelihood of Serious Emotional or Physical Damage*

Section 1912(f) requires a qualified expert to provide evidence satisfying this Court beyond a reasonable doubt "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The family court applied a clear and convincing standard of review, pursuant to *Santosky v. Kramer*, 455 U.S. 745 (1982), even though the instant case deals with termination of parental rights under the ICWA. While the family court misinterpreted *Santosky*,[24] considering it found Appellants failed to

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868-70 (terminating parental rights after mother's home could not be made safe within twelve months due to mother's physical and sexual abuse of her two children over the course of four years); *S.C. Dep't of Soc. Servs. v. Broome*, 307 S.C. 48, 48, 413 S.E.2d 835, 835 (1992) (terminating parental rights after mother failed to support child by making only three court ordered child support payments over a one-year period, attending only thirty-five of ninety-four visits scheduled with the child over a four-year period, and failing to visit the child at all for a period of five months); *Dep't of Soc. Servs. v. Phillips*, 365 S.C. 572, 580, 618 S.E.2d 922, 926 (Ct. App. 2005) (terminating parental rights after children were exposed to sexual behaviors between mother and father and mother failed to remedy her drug addiction problem during the year the children were removed from the home).

[24] In *Santosky*, the Supreme Court held that the *minimum* burden of proof allowable in a state-initiated termination of parental rights proceedings was "clear and convincing evidence." 455 U.S. at 769. Any lesser standard would deprive a parent of due process under the law. *Id.* While the *Santosky* court mentioned that states might find the "beyond a reasonable doubt" standard utilized in the ICWA an "unreasonable barrier to state efforts to free permanently neglected children for adoption," the thrust of the *Santosky* decision was to create a minimum, not a

meet even the lower burden, we agree that Appellants have not satisfied their burden of proving that Father's custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt.

The family court admitted the testimony of Dr. Bart Saylor as Appellants' expert witness to demonstrate the likelihood of damage to Baby Girl if removed from Appellants' custody. Dr. Saylor, a licensed clinical psychologist and designated forensic psychologist, conducted a bonding evaluation with Appellants and Baby Girl, but had no contact with Father. Dr. Saylor only considered the effect of severing Baby Girl's bond with Appellants and did not review any information about Father's capacity to form a loving relationship with Baby Girl. Although Dr. Saylor admitted he did not have specific training in Cherokee child rearing practices, he did not believe knowledge of Indian culture was necessary to evaluate the bonding between Baby Girl and Appellants. Dr. Saylor testified that Appellants and Baby Girl had a very strong bond, and therefore,

> I believe that at this point removal from the one and only parents, the secure, the bonded relationship, the one and only that she has with these parents at this age would be very traumatic, would be very disruptive. It could produce depression, anxiety, it could cause disruption in her capacity to form relationships at a later age. It would be extremely stressful to her. It would be taking away everything that she had come to know and count on for her comfort and security

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maximum, burden of proof in termination of parental rights proceedings.

and replace it with something that would be completely unfamiliar and strange to her.

Dr. Saylor confirmed that he believed beyond a reasonable doubt that Baby Girl's removal from Appellants would cause serious emotional harm. However, Dr. Saylor agreed that even though a child may have bonded successfully one time, a child can bond again. Finally, he could not say what long-term harm would result from Baby Girl's removal.

Father's expert, Tiffany Dunaway, a Child Welfare Specialist with the Cherokee Nation who has worked with between ten and fifteen transitioned children the same age as Baby Girl, conducted a home study on Father's family while Father was stationed on active duty in Iraq. Dunaway reported that the family home was clean, safe, and appropriate and that there were many acres of land surrounding the home for outdoor play. Based on her interaction with Father's parents, Dunaway opined, "this child will thrive, I don't have any doubt. I know we can't predict the future, but I think that she will be safe . . . . She'll know who she is and where she came from. She'll be very loved." Under cross-examination, Dunaway admitted that some transitioned children have difficulties, especially older children, but testified that these children have thrived overall. Dunaway admitted that she had never met Baby Girl, nor had she witnessed Father interact with a child the same age as Baby Girl. Dunaway's opinion about the ability of the child to thrive was based on anecdotal experience, and she could not produce any studies to

show that transitioned children thrive in the long-term.[25]

In its final order, the family court noted that Dr. Saylor could not render an opinion about the long-term effects of severing the bond between Appellants and Baby Girl, although he testified that in the short-term it would be very traumatic. The family court found persuasive the testimony that Father was a good father who enjoyed a close relationship with his other daughter and Dunaway's testimony that children around Baby Girl's age tended to thrive when reunited with their Indian parents. Therefore, the family court concluded that Appellants did not prove that "the child will suffer physical or emotional damage if returned to the custody of her biological father," and as a result, "the ICWA prohibits termination of his parental rights."

Appellants argue that section 1912(f) does not require a child to suffer long-term harm. Appellants urge this Court to find severe emotional harm likely based solely on the expected harm of severing Baby Girl's bond from the only parents she knows.

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[25] The dissent finds Dunaway's opinion "lacks credibility" as to whether Baby Girl would suffer harm if removed from Appellants' custody, citing testimony in which Appellants' counsel challenged Dunaway to provide statistics that children placed in tribal homes have not suffered serious harm, rather than basing her assertions on her personal experience as a case worker. We disagree that this exchange reflects negatively on Dunaway's credibility, as she testified to her personal experience in transitioning children. In any event, it was Appellants' burden to establish a likelihood of serious emotional or physical harm beyond a reasonable doubt if Baby Girl were placed with Father.

Initially, we note that the plain language of section 1912(d) requires a showing that the transferee parent's prospective legal and physical custody is likely to result in serious damage to the Indian child, not that the Indian child's *removal* from the custody of the adoptive parents will likely result in emotional damage, which in this case Appellants' expert admits is likely to be temporary.[26]

Absent any evidence to the contrary, we hold that Appellants' reliance on bonding, without more, cannot satisfy their high burden of proving that Father's custody of Baby Girl would result in serious emotional or physical damage to her. While we are conscious that any separation will cause some degree of pain, we can only conclude from the evidence presented at trial that Father desires to be a parent to Baby Girl, and that he and his family have created a safe, loving, and appropriate home for her. Furthermore, Father instituted child custody proceedings when Baby Girl was four months old. *See Rick P. v. State, OCS*, 109 P.3d 950, 958 (Alaska 2005) (footnote

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[26] Even in cases of the *voluntary* relinquishment of parental rights, the parent has the ability under the ICWA to renege on his or her consent "*for any reason at any time*" before the entry of the final decree of termination or adoption. *See* 25 U.S.C. § 1913(c) (emphasis added). Thus, the ICWA gives conclusive preference to parental custody over custodial stability. Indeed, the dissent's dependence on Father's perceived lack of interest in or support for Baby Girl during the pregnancy and first four months of her life as a basis for termination his rights as a parent is not a valid consideration under the ICWA for this same reason. Because the ICWA permits a parent to revoke voluntary consent up until the final adoption decree for any reason at all, whatever Father's deficit in expressing interest in Baby Girl, it clearly falls short of consent to termination, and even then, his rights would not be prejudiced until a final decree.

omitted) ("Our cases indicate that a parent's willingness to resume parental duties does not 'remedy' abandonment if this change of heart comes too late for the parent to bond with the child during the critical early phase of the child's life."). Because Father intervened at this early point and most of the bonding occurred during the course of this litigation, it should not be a factor that weighs against Father. *See Holyfield*, 490 U.S. at 53-54 (1989) ("We are not unaware that over three years have passed since the twin babies were born and placed in the [adoptive] home, and that a court deciding their fate today is not writing on a blank slate in the same way it would have [three years ago]. Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain . . . . Had the mandate of the ICWA been followed [three years ago], of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'" (citation omitted)). Thus, the bonding that occurred during litigation, without more, cannot form the basis for terminating Father's parental rights.

3. State Statutory Grounds for Termination

Because we have found that Appellants have not met their burden of proof to establish termination under the ICWA, we need not address the grounds for termination elucidated in section 63-7-2570 of the South Carolina Code. *See Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 307, 676 S.E.2d 700, 706 (2009) (appellate court need not discuss remaining issues when determination of prior issue is dispositive).

4. Best Interests of the Child

South Carolina courts have a long history of determining custody disputes based on the "best interests of the child." *See Hooper v. Rockwell*, 334 S.C. 281, 295, 513 S.E.2d 358, 366 (1999) ("This Court long has tried to decide all matters involving the custody or care of children in 'light of the fundamental principle that the controlling consideration is the best interests of the child.'" (quoting *In Re Doran*, 129 S.C. 26, 31, 123 S.E. 501, 503 (1924))). This important history is not *replaced* by the ICWA's mandate. *See In re Welfare of L.N.B.-L*, 237 P.3d 944, 965 (Wash. Ct. App. 2010) ("ICWA's applicability does not mean that ICWA replaces state law with regard to a child's best interests.") Instead, "[w]ell-established principles for deciding custody matters should further [the ICWA's] goals." *Id.* (quoting *In re Mahaney*, 51 P.3d 776, 785 (Wash. 2002)).

Where an Indian child's best interests are at stake, our inquiry into that child's best interests must also account for his or her status as an Indian, and therefore, we must also inquire into whether the placement is in the best interests of the *Indian child*. *See* 25 U.S.C. § 1902 ("The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs."). In making this determination, the child's relationship with his or her tribe is an

important consideration, as the ICWA is "based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *Holyfield*, 490 U.S. at 50 n.24 (quoting *In re Appeal in Pima Cnty. Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. 1981)).[27] Thus, Baby Girl, as an Indian child, has a strong interest in retaining ties to her cultural heritage. *See id.* at 49-50 ("In addition, it is clear that Congress's concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture. ").[28]

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[27] While the *tribe* ultimately decided to return the *Holyfield* children to the adoptive parents, the dissent fails to account for the marked difference between the facts of the *Holyfield* custody dispute and those of the present controversy, and the actual basis for the tribe's decision: the children had been in the care of the adoptive parents for four years; they did not understand the Choctaw language, which was the predominant language spoken in most Choctaw homes; and no adoptive tribal home was waiting for the children, so that interim placement in foster care would have been necessary. *See* Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 Colum. J. Gender & L. 1, 17-18 (2008). Moreover, the tribal court ordered that the children maintain contact with their Choctaw extended family and tribe, and the placement was within the same state. *Id.* at 18; *Holyfield*, 490 U.S. at 40. Thus, the children's and tribe's respective interests in maintaining cultural ties were still protected.

[28] The Record establishes that Father's family has a deeply embedded relationship with the Cherokee Nation. For example, not only does the Record indicate that Father and his family are proud of their heritage and membership in the Wolf Clan, the home study performed on Father's parents states the following:

> [Father's father] is Cherokee Indian. He grew up knowing he was Cherokee and being proud of who he was. [Father's parents] . . . prepare the following traditional foods in their

The family court order stated, "[w]hen parental rights and the best interests of the child are in conflict, the best interests of the child must prevail. However, in this case, I find no conflict between the two."[29] Likewise, we cannot say that Baby Girl's best

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> home: grape dumplings, buckskin bread, Indian cornbread, Indian tacos, wild onions, fry bread, polk salad and deer meat. [Father's mother] state[d] she cooks these foods in her home on a regular basis and all of her children have eaten these items.
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> [Father's parents] attend the Cherokee Holiday in Tahlequah, Oklahoma[,] when they can and participate in eating traditional foods, viewing the arts and crafts and watching the traditional games. [Father's father] participates in voting in the Cherokee elections[,] . . . . took part in learning about the Cherokee culture when his children were in high school by learning to make Indian crafts and learning to play the drum[, and] . . . . is sometimes seen at the Nowata Indian Health Clinic but receives the majority of his health care from the Veterans hospital. He claims his family is from the Wolf Clan, and he has been to as well as participated in stomp dances.
>
> [H]is family had Indian land which was located in Pryor, Oklahoma and Cayuga, Oklahoma. He claims to have very traditional ties with his extended family and considers geneology [sic] a hobby by researching his Cherokee culture. [Father's parents] have many Native American items in their home. Decorative Native American pieces are scattered throughout their home in nearly every room.

Thus, the Record demonstrates that Father and his family are well-positioned to introduce Baby Girl to her Indian heritage.

[29] The dissent states: "It is apparent that the decision of the family court judge was influenced to some extent by the erroneous legal conclusion that ICWA eclipses the family court's obligation to determine what would be in the child's best interests." We do not read the family court's order to be based on that erroneous assumption. Plainly, the family court determined that there was no conflict between Father's best interests and Baby Girl's best interests. *See* S.C. Code Ann. § 63-9-20 (stating that

interests are not served by the grant of custody to Father, as Appellants have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family. Moreover, in transferring custody to Father and his family, Baby Girl's familial and tribal ties may be established and maintained in furtherance of the clear purpose of the ICWA, which is to preserve American Indian culture by retaining its children within the tribe. *See Holyfield*, 490 U.S. at 37.

C. Preferential Placement

Furthermore, even if we were to terminate Father's rights, section 1915(a) of the ICWA establishes a hierarchy of preferences for the adoptive placement of an Indian child.[30] *See* 25 U.S.C. 1915(a). That section provides: "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." (emphasis added). While not binding, the Bureau of Indian Affairs Guidelines concerning good cause state that courts may look to the "request of the biological parents or the child when the child is of sufficient age," the "extraordinary physical or emotional needs of the child as established by testimony of a qualified expert wit-

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in adoption proceedings "when the interests of a child and an adult are in conflict, the conflict must be resolved in favor of the child.").

[30] *Holyfield* describes this provision as "[t]he most important substantive requirement imposed on state courts" under the ICWA towards creating a federal policy that an Indian child should remain with his or her tribe whenever possible. *Holyfield*, 490 U.S. at 36, 37 (citation omitted).

ness," and the "unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria" when deciding to deviate from the stated preferences. 44 Fed. Reg. 67584, 67954-95 (1979). The party seeking to deviate from the preferences bears the burden of demonstrating that good cause exists. *Id.*

From the outset, rather than seek to place Baby Girl within a statutorily preferred home, Mother sought placement in a non-Indian home.[31] In our view, the ensuing bond that has formed in the wake

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[31] The biological parents' placement preference is not the guiding consideration under the ICWA. Rather, the ICWA assigns great weight to tribal preference when placing Indian children. *See Holyfield*, 490 U.S. at 52-53 ("The protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for nondomiciliary Indian children. [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents." (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969-970 (1986))); Roger A. Tellinghuisan, *The Indian Child Welfare Act of 1978: A Practical Guide With [Limited] Commentary*, 34 S.D. L. Rev. 660, 666 (1989) ("Holyfield also carries the clear message that [the ICWA] would be read liberally, perhaps creatively, to protect the rights of the tribe even against the clearly expressed wishes of the parents . . . .").

of this wrongful placement cannot be relied on by Appellants and the dissent to deviate from the ICWA's placement preferences.

While the best interests of the child standard is always a guiding consideration when placing a child, any attempt to utilize our state's best interests of the child standard to eclipse the ICWA's statutory preferences ignores the fact that the statutory placement preferences and the Indian child's best interests are not mutually exclusive considerations. Instead, the ICWA presumes that placement within its ambit is in the Indian child's best interests. *See In re C.H.*, 997 P.2d 776, 784 (Mont. 2000) ("[T]he best interests of the child . . . is an improper test to use in ICWA cases *because the ICWA expresses the presumption that it is in an Indian child's best interests to be placed in accordance with statutory preferences*. To allow emotional bonding—a normal and desirable outcome when, as here, a child lives with a foster family for several years—to constitute an 'extraordinary' emotional need [comprising good cause to deviate from the preferences] would essentially negate the ICWA presumption." (emphasis added)). Therefore, "the unfettered exercise of [state] discretion poses a real danger that the ICWA preferences will be overridden upon the slightest evidence favoring alternative placement." Barbara Ann Atwood, *Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587, 645 (2002). Thus, the bonding that has occurred between Appellants and Baby Girl has not satisfied this Court that custody with Father is against Baby Girl's best interests. For this reason, under these facts, we cannot say that bonding, standing alone, should form the basis for deviation from the statutory placement preferences.

CONCLUSION

We do not take lightly the grave interests at stake in this case. However, we are constrained by the law and convinced by the facts that the transfer of custody to Father was required under the law. Adoptive Couple are ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl. Thus, it is with a heavy heart that we affirm the family court order.

Because this case involves an Indian child, the ICWA applies and confers conclusive custodial preference to the Indian parent. All of the rest of our determinations flow from this reality. While we have the highest respect for the deeply felt opinions expressed by the dissent, we simply see this case as one in which the dictates of federal Indian law supersede state law where the adoption and custody of an Indian child is at issue. Father did not consent to Baby Girl's adoption, and we cannot say beyond a reasonable doubt that custody by him would result in serious emotional or physical harm to Baby Girl. Thus, under the federal standard we cannot terminate Father's parental rights. For these reasons, we affirm the family court's denial of the adoption decree and transfer of custody to Father.

AFFIRMED.

PLEICONES and BEATTY, JJ., concur. KITTREDGE, J., dissenting in a separate opinion in which HEARN, J., concurs. HEARN, J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

JUSTICE KITTREDGE: I dissent. I would reverse and remand for the entry of an order terminating the father's parental rights and approving the adoption. I would further order the immediate return of the minor child to the adoptive parents.

Today the Court decides the fate of a child without regard to *her* best interests and welfare. I disagree that Congress intended the Indian Child Welfare Act[32] (ICWA or Act) to be applied in derogation of the child's best interests and welfare. *See In re Welfare of L.N.B.-L*, 237 P.3d 944, 965 (Wash. Ct. App. 2010) ("ICWA's applicability does not mean that ICWA replaces state law with regard to a child's best interests"); *In re Mahaney*, 51 P.3d 776, 785 (Wash. 2002) (observing that ICWA's applicability "should not signal to state courts that state law is replaced by the act's mandate"). ICWA envisioned a symbiotic relationship between the additional protections of the Act and well-established state law principles for deciding custody matters in accordance with the best interests of the child. The simple fact that a child is an "Indian child" is not dispositive of the placement question. In my judgment, Congress intended ICWA-controlled cases to be decided based on a preference for placement with an Indian family, not an irrebuttable presumption mandating an Indian family placement. Even in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1988), the only case in which the United States Supreme Court has addressed ICWA, the tribal court, on remand, ordered child placement with the non-Indian adoptive parent. *See*

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[32] "ICWA establishes Federal minimum standards for the removal of Indian children from their homes and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ." 25 U.S.C. § 1902.

Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 Colum. J. Gender & L. 1, 17-18 (2008).

In my judgment, under our *de novo* review, the unique facts of this case manifestly overcome the statutory placement preference and compel placement of this child with the adoptive couple. The facts of a case cannot be ignored. With great respect for the majority, I believe it has recast the facts to portray Father in an undeserved favorable light, thus creating the illusion that Father's interests are in harmony with the best interests of the child. The reality is Father purposely abandoned this child and no amount of revisionist history can change that truth.

As for the protracted procedural history, the Court blames the birth mother and the adoptive couple-everyone except the Father, whose vanishing act triggered the adoption in the first instance. As I view the evidence, the interests of Father and Respondents are directly contrary to the best interests of this child. I believe the law, including ICWA, supports my view that the best interests of the child must prevail.

I.

STANDARD OF REVIEW

This Court's standard of review in an appeal from the family court is *de novo*. S.C. Const. art. V, § 5 ("The Court shall have appellate jurisdiction . . . in cases of equity, and in such appeals they shall review the findings of fact as well as the law . . . ."); *Lewis v. Lewis*, 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). As such, "the appellate court has jurisdiction to find facts in accordance with its view of the preponderance of the evidence." *Lewis*, 392 S.C. at 384, 709

S.E.2d at 651. Although we generally defer to findings of fact by the family court due to its ability to assess the demeanor and credibility of witnesses, our standard of review does not require any deference. Having carefully reviewed the voluminous record, with great respect for the able family court judge, I am firmly persuaded that the family court judge erred in her factual findings, especially in the application of the facts to the law. Determining the proper interpretation of a statute is a question of law for our plenary review. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); *see also E.D.M. v. T.A.M.*, 307 S.C. 471, 473, 415 S.E.2d 812, 814 (1992) (noting the appellate court has authority to correct errors of law in appeals from family court orders).

II.

FACTS

At the center of this controversy is a child ("Baby Girl") born to unwed parents on September 15, 2009. Before her birth, the biological parents ("Mother" and "Father") were engaged to be married but were not living together. In addition to Baby Girl, Father has a child from a previous relationship who was six years old at the time of the engagement. Father pays support for his other child through a deduction from his military pay; however, those payments began only after that child's mother brought an action against him in family court because he accrued an estimated $11,000 child support arrearage.[33]

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[33] There are allegations that Father has another child; however he denies paternity and does not support that child.

When Mother and Father were dating, Father was serving in the military and stationed in Fort Sill, Oklahoma, approximately four hours away from his hometown of Bartlesville, Oklahoma, where his parents and Mother lived with her two other children from a previous relationship. Father visited Mother in Bartlesville during his fourteen-day break in December 2008, and although he was permitted to leave the military base on weekends, he seldom made the four-hour drive from Fort Sill to Bartlesville.[34]

In January 2009, Mother told Father they were expecting a child.[35] Before her first prenatal doctor's appointment, Mother asked Father for financial assistance. Although he acknowledged paternity from the outset, Father refused to help financially unless he and Mother were married. At trial, Father was asked, "But she had to marry you before you felt

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[34] Father explained, "Being four hours away I was able to come home on the weekends, but I didn't make the right amount of money, you know, to be sufficient enough for me to come home, you know, whenever I wanted to." The record reveals Father's annual salary was $20,227 in 2009 and $23,697 in 2010. Because of Father's military service, he was not required to pay income taxes when in active service. Additionally, his housing and food expenses were covered by the military, and Father admitted virtually all of his salary was disposable income. The only recurring expenses Father mentioned were $20-25 per week for cigarettes and going to bars "drinking with [his military] buddies, joking and having a good time."

[35] There is conflicting evidence as to Father's reaction to this news. Father testified he was "very happy" to learn they were expecting a child. However, Mother testified Father "didn't really have a reaction" and "every time [she] would bring it up, he really didn't say a whole lot." I find Mother's testimony more credible, as Father's lack of interest in his child and refusal to provide Mother any support strongly corroborates her testimony as to Father's reaction to learning of the pregnancy.

you'd be responsible as a father?" He answered, "Correct." After her prenatal appointment, Mother told Father the baby's due date was in September 2009.

In the months thereafter, despite the Court's attempt to recast the facts in a light more favorable to Father, he wanted nothing to do with the pregnancy and related responsibilities. The couple's relationship became "extremely distant" and by June 2009, they were no longer speaking to one another.[38]

Throughout Mother's pregnancy, Father never offered to pay any of her medical or living expenses or accompany her to any doctor's visits, even though he admitted he was capable of doing so. According to Father, he would have given Mother support, but he "never got[] anything from the state of Oklahoma for child support." Eventually, with Father abandoning parental responsibilities, Mother broke off the relationship. Shortly thereafter, Mother sent Father a text message inquiring whether he wanted to support her and their child or relinquish his parental rights. Father sent a return text message to Mother expressly indicating his desire to give up his parental rights.

Father later claimed he would not have "given up" his parental rights had he known Mother planned to place the baby for adoption. However, during

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[38] According to the Guardian *ad Litem*'s report, "Phone records obtained by the Guardian confirm many texts coming into [Father's] telephone from the Birth Mother's telephone number through the end of May," despite Father's claim that Mother severed contact and would not respond to his repeated attempts to reach her.

Father's cross-examination the following exchange took place:

> Q. But you were prepared to sign all your rights and responsibilities away to this child just so as long as the mother was taking care of the child?
>
> A. That's correct.
>
> Q. And you would not be responsible in any way for the child support or anything else as far as the child's concerned?
>
> A. Correct.
>
> Q. That's correct? Is that conducive to being a father?
>
> A. I don't believe so.

Mother was already struggling financially as a single mother of two children, and she knew it would be even more difficult to provide for a third child without help from Father. Mother testified she "wanted [her] little girl to have a chance," and she believed an adoption plan would be in the best interests of Baby Girl. Due to Father's stated disinterest in supporting or rearing the child, coupled with Mother's belief that Father's verbal and written expressions effectively relinquished his parental rights, she did not inform Father that she planned for the child to be adopted.

In June 2009, Mother was introduced to Adoptive Couple ("Appellants") after she contacted an adoption agency in Oklahoma. Appellants reside in Charleston, South Carolina, and have been married for six years. The couple received infertility treatment for years and underwent seven unsuccessful in vitro fertilization attempts before deciding to adopt.

Mother testified that she considered other families residing in Oklahoma, but she ultimately selected Appellants as an adoptive couple because they had values similar to her own and could provide Baby Girl a stable and loving home. In the weeks leading up to Baby Girl's birth, Appellants spoke to Mother weekly and traveled to Oklahoma to visit Mother in August 2009. Appellants helped support Mother during the last few months of her pregnancy and shortly after Baby Girl's birth.

Before she gave birth, Mother informed the adoption agency she had Cherokee heritage and that she believed Father was an enrolled member of Cherokee Nation. Mother provided her attorney with Father's correctly spelled name and location and what she believed to be his date of birth.[37] Mother's attorney forwarded this information to Cherokee Nation in a letter dated August 21, 2009. The letter also stated Father was believed to be an enrolled member and inquired whether the tribe would consider Baby Girl to be an "Indian Child" under ICWA. However, in the letter, Father's first name "Dusten" was misspelled "Dustin," and his date of birth was not accurate. Based on that incorrect information, Cherokee Nation replied in a letter dated September 3, 2009, that the unborn baby could not be traced to tribal records and therefore would not be considered an "Indian Child." However, Cherokee Nation's letter also stated, "This determination is based on the above listed information exactly as provided by you. Any incorrect or omitted family documentation could invalidate this determination." Mother testified she

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[37] Mother testified she knew Father's birthday was in October and that he was older than she was, so Father's year of birth was sometime before 1982.

told her attorney the letter from Cherokee Nation was wrong and that Father was an enrolled member of the tribe; however, Mother admitted she did not know Father's correct birth date.[38]

Appellants were present for Baby Girl's birth on September 15, 2009. Appellants were in the delivery room when Mother gave birth to Baby Girl. Adoptive Father cut the umbilical cord.

Father, however, did not appear at the hospital or attempt to contact Mother while she was in the hospital.[39] The following day, Mother signed forms relinquishing her parental rights and consenting to the adoption of Baby Girl. Baby Girl was placed with

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[38] A trial, Cherokee Nation presented testimony of one of its employees as an expert in Cherokee Indian culture and Cherokee child-rearing. The expert testified that Cherokee names are often passed down and many members have the same name. According to the expert, the tribe uses "birth date, name, *something to get us somewhere close* to see if a person is [an] enrolled [member]."

At oral argument, counsel indicated Cherokee Nation has eight members with the first name "Dustin" or "Dusten" with the same last name as Father. It is unclear how many of those eight members have the same middle name as Father or live in Fort Sill, Oklahoma; however, when asked how many were born in the same month, counsel replied that she did not know, but that she "guessed" Father was the only one. Counsel further explained, "[Cherokee Nation] receive[s] possibly thousands of inquiries a year. Everyone in the country claims to be Cherokee. We can't track down every letter we get." Notwithstanding this assertion by counsel, the record includes correspondence from Cherokee Nation demonstrating that the tribe indeed responds to *some* inquiries with a follow-up request for additional information.

[39] Father admitted he knew the expected due date and that there was only one hospital available for the birth. However, there was no evidence Father attempted to be present.

Appellants shortly after her release from the hospital. Eight days after her birth, Appellants returned to South Carolina with Baby Girl.[40]

Although he was aware of the anticipated due date, Father made no attempt to contact Mother during the months after she gave birth to ask about Baby Girl, to request visitation, or to offer any gifts or financial support. According to Father's mother, she called Mother several times shortly after Baby Girl's birth to let her know the family had some money and some gifts for the baby, but Mother did not return her phone calls. Mother denied receiving calls or visits from any of Father's family members.

Appellants initiated adoption proceedings in Charleston, South Carolina, on September 18, 2009.

Because Father had evaded all parental responsibilities, he did not learn that Baby Girl was placed for adoption until he was served with a copy of Appellants' adoption complaint on January 6, 2010, a fact that the majority somehow believes inures to Father's benefit.[41] Father signed an acceptance of

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[40] A prerequisite to Appellants removing the child from Oklahoma was receiving consent from the State of Oklahoma pursuant to the Oklahoma Interstate Compact on Placement of Children (ICPC). Mother provided the documentation; however, the documentation reflected the child's race as "Hispanic" instead of "Native American." Notably, this document was completed on September 21, 2009, after receiving a letter dated Septemer 3, 2009, from Cherokee Nation indicating Baby Girl was not an Indian child and ICWA was not applicable. After the child was discharged from the hospital, Appellants stayed in Oklahoma for approximately eight days until they received ICPC approval.

[41] The complaint was served on Father just days before he was deployed to Iraq for approximately twelve months. Father returned from Iraq on December 26, 2010.

service stating that he was the father of Baby Girl, that he was not contesting the adoption, and that he waived the thirty-day waiting period and notice of hearing.

On January 11, 2010, Father requested a stay of the South Carolina adoption proceedings under the Servicemember's Civil Relief Act and three days later filed a summons and complaint in an Oklahoma district court to establish paternity, child custody, and support of the child. Father's complaint initially alleged that "[n]either parent nor the children [sic] have [sic] Native American blood.

Therefore the Federal Indian Child Welfare Act . . . do[es] not apply." The complaint was amended on April 19, 2010, to allege "[b]oth the father and the child have Native American blood. Therefore the Federal Indian Child Welfare Act . . . do[es] apply." The Oklahoma complaint named Appellants and Mother as defendants. Father departed for Iraq on January 18, 2010, with his father acting as power of attorney while he was away. On June 28, 2010, the Oklahoma action was dismissed on jurisdictional grounds, as South Carolina was the child's home state.[42]

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[42] Respondents challenge South Carolina's jurisdiction to hear this case, which is an improper effort to further litigate Father's unsuccessful Oklahoma action. Yet this Court accepts Respondents' invitation to weigh in on the Oklahoma action and castigate Appellants. No appeal was taken from the dismissal of the Oklahoma action, rendering the Oklahoma dismissal the law of the case. *See Ulmer v. Ulmer*, 369 S.C. 486, 632 S.E.2d 858 (2006) (noting an unappealed ruling becomes law of the case and precludes further consideration of the issue on appeal). Before acknowledging this issue is not before us, the majority's superfluous discussion attributes nefarious motives to Appellants and

At some point during the pendency of the Oklahoma action, Cherokee Nation identified Father as a registered member and determined that the child was an Indian Child, as defined by ICWA.[43] On March 30, 2010, Appellants amended their South Carolina pleadings to acknowledge Father's membership in Cherokee Nation. On April 7, 2010, Cherokee Nation filed a Notice of Intervention in the South Carolina action.

The case was tried in September of 2011. The interest of Baby Girl was represented by a Guardian *ad Litem*, who recommended that Father's rights be terminated and the adoption be approved.[44] On November 25, 2011, a final order was issued, in which the family court found ICWA applied and further that Father's parental rights should not be terminated under South Carolina law. The family

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refers to Baby Girl's transfer to South Carolina as improper. Again, Father, who ran away from parental responsibilities, avoids any responsibility. I do not understand how an unwed birth father who willfully abandons his child escapes even the slightest blame.

[43] An Indian child means "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

[44] I note the parties agreed that the family court would not consider the portions of the Guardian *ad Litem*'s report going to the ultimate issues to be decided—specifically, the aspects of the report concerning the child's best interests and custody recommendation. Likewise, I do not consider the Guardian *ad Litem*'s ultimate recommendations and emphasize that my findings of Baby Girl's best interests are reached separately and independently.

court denied Appellants' petition for adoption and transferred custody of Baby Girl to Father.

III.

LAW/ANALYSIS

Based upon my *de novo* review of the record, the family court's findings are affected by several reversible errors. Specifically, the family court erred in finding Appellants failed to meet their burden of proving grounds for termination of Father's parental rights. As discussed in detail below, it was error to conclude that Father's failures to support and visit were not willful under state law. Father knowingly abandoned his parental responsibilities in every respect, including his willful failure to contribute any support until token efforts were made well after this adoption proceeding was underway. Yet, state law is not the only relevant consideration; rather, state law must be considered along with the federal mandates superimposed by ICWA.

A.

Overview of ICWA

ICWA establishes "minimum Federal standards for the removal of Indian children from their families," and applies to any child custody proceeding involving an Indian child. *See* 25 U.S.C. §§ 1902, 1903, 1911. Congress enacted ICWA in response to the "rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Holyfield*, 490 U.S. at 32. The legislative history of ICWA

indicates Congress was concerned with "'the wholesale removal of Indian children from their homes, the most tragic aspect of Indian life today.'" *Id.* (quoting Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler)). As one Tribal Chief testified, "Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child." *Id.* at 34 (quoting Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 191-92 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association)).

Thus, ICWA was intended to preserve tribal sovereignty and avoid the culturally inappropriate removal of Indian children based on the tendency of "many social workers, ignorant of Indian cultural values and social norms . . . [to] discover neglect or abandonment where none exists." H.R. Rep. No. 1386, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7533.[45] Accordingly, the express purpose of

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[45] The House Report describes a particular aspect of Indian culture that is frequently misunderstood:

ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902.

However, almost forty years later, in struggling with the human reality of implementing ICWA, courts frequently face competing tensions concerning an individual child's personal and cultural identity. "The grand narrative underlying the Act, while born of a grim history of governmental destruction of Indian tribes, families, and culture, sometimes has little direct correlation with the actual circumstances of individual Indian children before state court judges." Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 Emory L.J. 587, 596 (2002). "In any child welfare case, it is essential that the decisionmaker be able to exercise discretion in arriving at a disposition that is most likely to protect the future welfare of the unique child." *Id.* I would adopt this well-reasoned approach and reject the majority's approach of applying ICWA in a rigid, formulaic manner without regard to the

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> [T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

H.R. Rep. No. 1386, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7533. At trial, Cherokee Nation presented expert testimony that the involvement of extended family members in child-rearing is an aspect that is culturally unique to Cherokee Indians.

facts of the particular case and the best interests of the Indian child.[46] I, unlike the majority, construe ICWA as allowing appropriate consideration of compelling circumstances in a particular case which bear on the individual child's physical, psychological, and social welfare.

B.

Applicability of ICWA

The family court found ICWA was applicable. Specifically, the family court found Cherokee Nation is an "Indian Tribe," Baby Girl is an "Indian Child," and Father is a "parent," as defined by ICWA. *See* 25 U.S.C. §§ 1903(4), (8)-(9).

Appellants do not challenge the family court's findings that Cherokee Nation is an "Indian Tribe" and Baby Girl is an "Indian Child." However, Appellants argue the family court erred in finding Father satisfies the ICWA definition of a "parent." ICWA defines a "parent" as:

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[46] Were the issue before this Court, I would reject the existing Indian family doctrine based on ICWA's clear statutory language in accordance with the modern trend. *See, e.g., In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982) ("It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother."), *overruled by In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009) (abandoning existing Indian family doctrine based on a finding it was "at odds with the clear language of ICWA"). There is scant evidence that Father ever established significant social or cultural ties with Cherokee Nation. I give the absence of such evidence no weight. The majority gives great weight to paternal grandparents' ties with the Cherokee Nation.

> any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or customs. *It does not include the unwed father where paternity has not been acknowledged or established.*

25 U.S.C. § 1903(9) (emphasis added).

Appellants argue the text, legislative history, and policy underlying ICWA demonstrate that unwed fathers must show more than "mere biology" to invoke the protections afforded to a parent under ICWA. ICWA does not expressly establish how an unwed father must acknowledge or establish paternity. According to Appellants, courts should look to the particular state's statutory prescription for when a father's paternity has been acknowledged.

Looking to South Carolina law, Father's consent to the adoption would not be required because he neither lived with Mother for a continuous period of six months before birth, nor contributed to her pregnancy-related expenses. As explained more fully below, I would reverse the family court in this regard.[47]

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[47] The Court could affirm the family court without upholding what I believe to be an egregiously erroneous determination that Father's rights would not be terminated under state law. By sidestepping the clear error of the family court, that is precisely what the Court has done. The indisputable fact is that Father provided *no* support to Mother during the pregnancy. Parental rights have been terminated under South Carolina law where the biological parent did far more to grasp the opportunity of parenthood than Father. *See Roe v. Reeves*, 392 S.C. 143, 708 S.E.2d 778 (2011) (finding father did not undertake a sufficient effort to make the sacrifices fatherhood demands where he bought pregnant mother sweatpants and t-shirt and

Specifically, in South Carolina, where a child is placed with the prospective adoptive parents within six months of birth, an unwed father's consent is required only if:

> (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
>
> (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

S.C. Code Ann. § 63-9-310(A)(5) (Supp. 2011); *see also Reeves*, 392 S.C. at 153, 708 S.E.2d at 784 ("It is not enough that the father simply have a desire to raise the child; he must act on that interest and make the

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offered to give mother $100, even though he attempted to visit mother in the hospital and maintain contact with mother after birth); *Doe v. Roe*, 369 S.C. 351, 631 S.E.2d 317 (Ct. App. 2006) (finding father's contributions to pregnant mother failed to meet general minimum standards of timely grasping the opportunity to assume full responsibility for his child where father contributed approximately $50, cigarettes, a pillow, and a few trips to fast food restaurants); *cf. Abernathy v. Baby Boy*, 313 S.C. 27, 437 S.E.2d 25 (1993) (finding father demonstrated willingness to develop a full custodial relationship with his child where he attempted to provide monetary support to mother during pregnancy, endeavored to keep apprised of her progress during the pregnancy, and appeared at the hospital and offered to pay medical expenses incurred from the birth).

material contributions to the child and the mother during her pregnancy required of a father-to-be.").

Because Father abandoned his child and would not be recognized as a putative father under South Carolina law, Appellants claim Father cannot be considered a parent under ICWA and his consent to the adoption is not required. Although I agree with Appellants that Father abandoned Baby Girl and that his rights would be terminated under state law without further inquiry, I nonetheless reject Appellants' contention that such a finding under state law precludes the application of ICWA to this case.

Appellants conflate the issues of consent under state law and the definition of "parent" under ICWA. The issues of paternity and whether one's consent is required in an adoption proceeding are separate questions. It is beyond dispute that Father has acknowledged *biological paternity* from the time Mother first informed him that she was pregnant. The fact that Father, from the beginning, ran from parental responsibilities cannot be used to challenge the issue of paternity. Moreover, Father admitted paternity in his pleadings in both the South Carolina and Oklahoma actions, and DNA testing conclusively established that he is the child's biological father. *Cf. In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988) (finding putative father not an ICWA parent where father never attempted to enforce his paternal rights, never commenced a proceeding to claim such rights, and failed to acknowledge or establish paternity prior to the entry of the final judgment of adoption). I concur with the family court's finding that Father meets the definition of parent under ICWA.

However, even if Father had not acknowledged paternity here, ICWA nonetheless would apply simply because Baby Girl is an Indian child. The Act's protections do not stem only from a parent's status as such. Rather, ICWA's protections were specifically designed to safeguard the interests and welfare of Indian *children*-not just parental rights.

Because ICWA applies and Father does not consent to the adoption, Appellants are required to prove grounds for terminating Father's parental rights and adoptive placement in accordance with ICWA and state law.

C.

Termination of Parental Rights

The majority avoids the family court's findings with respect to termination of Father's parental rights under state law. The family court held Appellants failed to prove by clear and convincing evidence the existence of any grounds to terminate Father's parental rights. Specifically, as concerns the state law considerations, the family court found Father's failure to visit and failure to support Baby Girl were not willful. Additionally, as concerns ICWA considerations, the family court found Appellants failed to meet their burden of proving that continued custody by Father was likely to result in serious emotional or physical harm to Baby Girl.

Appellants argue they demonstrated that Father's failure to visit and failure to support was willful and that termination of Father's parental rights was in the best interests of Baby Girl. I agree.

Unlike the majority, my view is predicated upon the guiding principle that "[t]he welfare and best interests of the child are paramount in custody disputes." *Woodall v. Woodall*, 322 S.C. 7, 11, 471 S.E.2d 154, 157 (1996); *see also S.C. Dep't of Soc. Servs. v. Cochran*, 364 S.C. 621, 614 S.E.2d 642 (2005) (stating that the best interests of the child are paramount to that of the parent in cases involving termination of parental rights). Nothing evinces any Congressional intent to disregard this cardinal rule in the context of ICWA; rather, Congress has expressly declared it is the policy of the United States to protect the best interests of Indian children. *See* 25 U.S.C. § 1902 ("[I]t is the policy of this Nation to protect the best interests of Indian children . . . ."). Thus, "ICWA's applicability does not mean that ICWA *replaces* state law with regard to a child's best interests." *L.N.B.-L.*, 237 P.3d at 965 (emphasis added) (finding continuation of father's and mother's parental relationship would likely result in serious emotional damage to their children and thus, termination of parental rights was in children's best interests); *see also In re Dependency of A.A.*, 20 P.3d 492, 495-96 (Wash. Ct. App. 2001) ("Regardless of the culture from which the parents come, when a termination proceeding is initiated in a Washington court, the best interests of the children at issue are paramount . . . . [T]he dominant consideration in a termination of parental rights is the moral, intellectual and material welfare of the child."); *In re Interest of C.W.*, 479 N.W.2d 105, 114 (Neb. 1992) (stating "ICWA does not change the cardinal rule that the best interests of the child are paramount") (internal quotation omitted)).

Therefore, ICWA's applicability "should not signal to state courts that state law is replaced by the act's mandate." *Mahaney*, 51 P.3d at 785. Rather, ICWA

envisioned a symbiotic relationship between the additional protections of the Act and well-established state law principles for deciding custody matters in accordance with the best interests of the child. *See Holyfield*, 490 U.S. at 58 (noting "Congress did not intend to 'oust the States of their traditional jurisdiction over Indian children falling within their geographic limits'" through enacting ICWA) (quoting H.R. Rep. No. 95-1386, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7541)). It is with these principles in mind that we should determine whether Appellants met their burden of showing that Father's parental rights should be terminated under both state law and federal law.[48]

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[48] The majority accuses me of ignoring the "most salient feature of the *Holyfield* decision, which is that the Supreme Court deferred to the *tribe* to decide what was in the best interest of those Indian children." I fully appreciate that the Supreme Court ultimately deferred to the Choctaw Tribe in that instance; however, unlike the majority, I recognize that such deference was afforded because the Indian children in *Holyfield* were required to be considered as domiciled on the reservation, and thus, the tribal courts were vested with *exclusive* jurisdiction to enter a decree of adoption pursuant to section 1911(a) of ICWA. *See Holyfield*, 490 U.S. at 53. In my view, the majority construes this narrow holding in *Holyfield* to require unwavering deference to the tribe in *all* matters—not just those relating to the power of tribal courts to adjudicate child custody proceedings vis-à-vis state courts where the Indian child is domiciled on the reservation. Indeed, the majority conflates the issues of venue, tribal sovereign jurisdiction, and the controlling feature of substantive law regarding the protection of an Indian child's best interests to justify its rigid view of ICWA's exclusive dominance in every realm. However, because the application of section 1911(a) is not presently before this Court, I find that *Holyfield*'s protection of tribal sovereignty, although properly zealous in that instance, does not mandate absolute deference to the Cherokee Nation's custody recommendations here.

1.

Grounds for Termination

The family court found Father's failure to visit and support Baby Girl did not show a settled purpose to forego his parental duties. These findings, especially as to Father's failure to support, are manifestly contrary to the evidence.

Regarding visitation, the family court found the child's removal from Oklahoma, Father's subsequent deployment to Iraq, and the contested nature of the custody lawsuit hindered Father's ability to visit Baby Girl. Regarding support, the family court found that Father was a full-time member of the military, was capable of providing support, but failed to offer any type of meaningful support to Mother or his child prior to being served with the adoption lawsuit. Nonetheless, the family court concluded Father's failure to contribute any support was not willful. In this regard, the family court found significant that

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Moreover, I fail to see how my position would disregard any of the interests ICWA affords to the Tribe. *See id.* at 49 ("The numerous prerogatives accorded the tribes through the ICWA's substantive provisions, e.g., §§ 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over nondomiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court actions), 1915(e) (right to obtain records), 1919 (authority to conclude agreements with States), must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves."). None of the Tribe's rights established by ICWA and enumerated in *Holyfield* are implicated, much less disregarded, here. Accordingly, I cannot understand the majority's continued emphasis on the primacy of tribal sovereignty as determinative of the outcome of this action.

Appellants never sought support from Father, he was not under any court order to pay support, and that he began paying child support when Baby Girl was sixteen months old.[49] While section 637-2570 allows for consideration of "requests for support by the custodian and the ability of the parent to provide support[,]" I would not give Father a reprieve on his failure to pay support simply because Appellants did not seek support from someone who had repeatedly expressed disinterest in the child.[50] Father's parental rights under South Carolina would have been terminated before Baby Girl was placed with Appellants. Moreover, I would consider this factor alongside well-settled law (discussed below) that a parent most certainly cannot excuse abandonment of parental responsibilities by claiming no one asked or demanded he or she act like a parent. *See, e.g., Reeves*, 392 S.C. at 152-53, 708 S.E.2d at 783 (noting that if the mother wants the father to stay away, he must respect her wishes but be sure that his support does not remain equally distant) (citing *In re Adoption of M.D.K.*, 58 P.3d 745, 750-51 (Kan. Ct. App. 2002) (Beier, J., concurring)).

The United States Supreme Court has issued a series of cases holding that the Constitution affords protection to an unwed father where the father has grasped the opportunity to be a parent; mere biology is not enough. *See, e.g., Lehr v. Robertson*, 463 U.S.

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[49] Beginning in February 2011, Father has intermittently sent checks to Appellants' attorney for the benefit of Baby Girl. According to the record, Father remitted seven checks totaling $1,500. The most recent payment was dated July 7, 2011.

[50] This is particularly so in light of the evidence at trial indicating Father refused to provide Mother with pre-birth financial assistance.

248 (1983) (holding failure to give putative father notice of adoption proceedings did not violate due process where he had never established a substantial relationship with his child).[51] Essentially, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Id.* at 260 (quoting *Caban v. Mohamed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)). Thus, "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'coming forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause." *Id.* at 261 (quoting *Caban*, 441 U.S. at 392). "[M]ere existence of a biological link does not merit equivalent constitutional protection." *Id.* "If [a natural father] grasps the opportunity" to develop a relationship with his child and "accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." *Id.* at 262. "If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." *Id.*

In recognition of these principles, South Carolina similarly requires an unwed father's parental rights to be predicated upon some involvement in the child's

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[51] *Lehr* was preceded by *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding due process was violated by the automatic rejection of an unwed father's custodial relationship without granting the father opportunity to present evidence regarding his fitness as a parent), and *Quilloin v. Walcott*, 434 U.S. 246 (1978) (denying constitutional protection to unwed father who had manifested only limited interest in his children).

life. Thus, if an unwed father fails to undertake parental responsibility, as in this case, his parental rights are jeopardized. A family court may terminate parental rights upon clear and convincing evidence of at least one enumerated statutory ground and a finding that termination is in the best interests of the child. *S.C. Dep't of Soc. Servs. v. Headden*, 354 S.C. 602, 608, 582 S.E.2d 419, 423 (2003) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

A parent's rights may be terminated if:

> (3) The child has lived outside the home of either parent for a period of six months, and during that time the parent has *willfully* failed to visit the child. . . . The distance of the child's placement from the parent's home must be taken into consideration when determining the ability to visit.
>
> (4) The child has lived outside the home of either parent for a period of six months, and during that time the parent has *willfully* failed to support the child. . . . The court may consider all relevant circumstances in determining whether or not the parent has willfully failed to support the child, including requests for support by the custodian and the ability of the parent to provide support.

S.C. Code Ann. § 63-7-2570 (Supp. 2011) (emphasis added). Willful conduct is that which "evinces a settled purpose to forego parental duties . . . because it manifests a conscious indifference to the rights of the child to receive support and consortium from the

parent." *S.C. Dep't of Soc. Servs. v. Broome*, 307 S.C. 48, 53, 413 S.E.2d 835, 839 (1992).[52]

Based on my *de novo* review of the evidence, Father's failure to visit Baby Girl was willful. Father made no meaningful effort to establish a relationship with Baby Girl when there was ample opportunity for him to do so. To the contrary, he avoided any rights and responsibilities to the child. As noted, on repeated occasions, Father expressed his willingness to sign away his parental rights.[53] Moreover, while

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[52] Although compliance with the literal requirements of section 63-7-2570 is usually required, there are instances in which a father's inability to undertake specific acts to preserve his parental relationship with his child may be excused, such as where an unwed father timely demonstrates a willingness to develop a relationship with his child but is thwarted from doing so by the refusal of the child's mother to accept his expressions of interest and commitment. *See Abernathy*, 313 S.C. at 32, 437 S.E.2d at 29 (finding an "unwed father is entitled to constitutional protection not only when he meets the literal requirements of section [63-7-2570], but also when he undertakes sufficient prompt and good faith efforts to assume a parental responsibility and to comply with the statute"). Here, the family court properly found Father was not entitled to the protection of the "thwarted father" exception because there is no evidence indicating he attempted to contribute to the support of his child during Mother's pregnancy or after the child's birth.

[53] The majority correctly notes that Father's various written and verbal expressions wishing to give up his parental rights were not legally binding. I do not understand why the majority undertakes such a substantial discussion of this issue, for no one has ever contended those expressions were legally binding. I do not equate them with valid legal consent to this adoption. Yet, at least to me, Father's clear expressions speak volumes about the element of willfulness in his abandonment of Baby Girl. Moreover, the relevance of this evidence to the issue of Baby Girl's best interests is self-evident. In my view, the revocability of a parent's consent under section 1913 of ICWA, to

Father was in Iraq until December 2010, Father failed to request visitation until he was deposed in this case. At the time of his request, Baby Girl was twenty-two months old, and Father had returned from active duty seven months earlier.[54]

I would also find that Father's failure to support Baby Girl was willful. I find the credible evidence shows Mother immediately informed Father of her pregnancy and requested financial assistance, but Father neither offered nor assisted Mother with either the pregnancy or with the medical costs associated with pregnancy and birth. According to Father, he would have paid child support if he had received a court order directing him to do so or if Mother had requested support and agreed to marry him.

However, unlike the family court, I find Father's purported willingness to provide support changes nothing. The suggestion that an unwed father's duty to support his child is conditioned on marriage, a formal plea from the mother or official state action is transparently frivolous. Further, Father's claimed willingness to provide support is of no moment for he did not *actually* provide any support and cannot demonstrate any legitimate excuse for failing to do so. As this Court recently stated:

> [An unwed father] must provide support regardless of whether his relationship with the mother-

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which the majority refers, does not render irrelevant a parent's repeated expressions of unwillingness and disinterest in parenting.

[54] According to Father, he never sent any cards or letters seeking progress reports on Baby Girl because he was unsure of whether he might be "going against any legal rights or anything like that. I didn't want to break the law."

> to-be continues or ends. He must do this regardless of whether the mother-to-be is willing to have any type of contact with him whatsoever or submit to his emotional or physical control in any way.
>
> . . . .
>
> He must not be deterred by the mother-to-be's lack of romantic interest in him, even by her outright hostility. If she justifiably or unjustifiably wants him to stay away, he must respect her wishes but be sure that his support does not remain equally distant.

Reeves, 392 S.C. at 152-53, 708 S.E.2d at 783 (quoting *In re Adoption of M.D.K.*, 58 P.3d at 750-51).

Further, we are not constrained to consider only Father's recent conduct towards Baby Girl. Rather, the "court is able to look beyond the months immediately preceding the [termination of parental rights] action at the [parent's] *overall* conduct." *Headden*, 354 S.C. at 612-13, 582 S.E.2d at 425. "While a parent's curative conduct after initiation of an action for termination of parental rights may be considered by the court on the issue of intent, it must be considered in light of the timeliness by which it occurred." *Abercrombie v. LaBoon*, 290 S.C. 35, 38, 348 S.E.2d 170, 171-72 (1986). "Rarely would this judicially motivated repentance, standing alone, warrant a finding that an abandonment had been cured." *Id.* at 38, 348 S.E.2d at 172.

Father failed to pay any child support until Baby Girl reached sixteen months of age and did so incon-

sistently and in an insubstantial amount.[55] As I have previously stated, the eventual payments of child support and isolated request for visitation are untimely, and I find them to be judicially motivated repentance falling short of curative conduct. *See Reeves*, 392 S.C. at 153, 708 S.E.2d at 784 ("[A] father's attempts to assert his parental rights are insufficient to protect his relationship with the minor child 'unless accompanied by a prompt, good-faith effort to assume responsibility for either a financial contribution to the child's welfare or assistance in paying for the birth mother's pregnancy or childbirth expenses.'"); *Doe v. Roe*, 386 S.C. 624, 633, 690 S.E.2d 573, 578 (2010) (acknowledging Father's attempts to provide support and seek visitation when child was nine months old but finding such effort "came too late for it to have any significant import"); *Ex parte Black*, 330 S.C. 431, 435 n.1, 499 S.E.2d 229, 232 n.1 (Ct. App. 1998) (finding initial attempts to evade parental responsibilities were not cured by later efforts to assume a parental relationship, where efforts arose at the urging of father's family and only after he realized mother had relinquished her parental rights).

I conclude Father has failed to "grasp his opportunity" to develop a relationship with Baby Girl and the record reflects clear and convincing evidence to support the termination of Father's parental rights under subsections (3) and (4) of section 637-2570. The family court's findings in this regard are error. I would terminate Father's parental rights under state law, specifically section 63-7-2570 (3) and (4).

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[55] According to his own testimony, the amount Father has set aside for child support since Baby Girl's birth is roughly equal to the amount he spends on cigarettes in a single year.

2.

Best Interests of the Child

It is apparent that the decision of the family court judge was influenced to some extent by the erroneous legal conclusion that ICWA eclipses the family court's obligation to determine what would be in the child's best interests. In light of this error of law and based upon my review of the record, I would hold that it is in Baby Girl's best interests for Father's parental rights to be terminated.

"[T]he welfare of the child and what is in his/her best interest is the primary, paramount and controlling consideration of the court in all child custody controversies." *Davis v. Davis*, 356 S.C. 132, 135, 588 S.E.2d 102, 103-04 (2003). The Court acknowledges this settled principle but ignores it in application.[86] "The family court must consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child." *Woodall*, 322 S.C. at 11, 471 S.E.2d at 157. "In addition, psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life should be considered." *Id.* As I have previously noted, "ICWA's applicability does not mean that ICWA replaces state law with regard to a child's best interests." *In re Welfare of L.N.B.-L*, 237 P.3d at 965. Moreover ICWA's applicability "should not sig-

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[86] The Court notes "that even under South Carolina law, we do not terminate parental rights merely because a parent is not a perfect parent." I agree, as this is simply another example of the majority attributing to me a position I do not take. It is clear to me from the totality of the majority's analysis that its application of ICWA has eviscerated any meaningful consideration of Baby Girl's best interests, despite its lip service to this settled principle.

nal to state courts that state law is replaced by the act's mandate," *In re Mahaney*, 51 P.3d at 785. Therefore, I consider the best interests of Baby Girl in light of the symbiotic relationship between the ICWA and well-established state law principles.

The Guardian *ad Litem* appointed to represent the interests of Baby Girl reported that Adoptive Mother has made her career as a specialist in child development and works from home, which allows interaction with Baby Girl throughout the day. Moreover, the Guardian found Appellants are child-focused and family-oriented, and Baby Girl has thrived in their care. The Guardian conducted a home visit in Oklahoma with Father and paternal grandparents. The Guardian found Father's family "appears to genuinely care for each other" and that it was the family's desire to receive the child into their home. However, the Guardian expressed concerns regarding Father were he to assume a role as primary caregiver. The Guardian testified about her concerns that Father chose to leave active military service without first arranging full-time civilian employment. Further, the Guardian noted Father has not developed a parenting plan that would enable him to provide for his children beyond that which is afforded by his parents.[57]

Additionally, consideration of Father's behavior as it relates to the statutory grounds for termination is appropriate for purposes of the best interests determination because his conduct "evinces a settled pur-

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[57] The portions of the report upon which I rely relate only to the Guardian *ad Litem*'s factual observations of Father's conduct and concerns about his parenting abilities. Those portions are unrelated to any disparity in education and wealth between Father's family and Appellants.

pose to forego parental duties." *Headden*, 354 S.C. at 610, 582 S.E.2d at 423 (citation omitted). Although I recognize Father began intermittently paying child support when Baby Girl was sixteen months old, and sought visitation when she was twenty-two months old, consistent with our existing jurisprudence, I find that these actions "came too late." *Id.* at 611, 582 S.E.2d at 423. By the time Father began these efforts to undertake his parental responsibilities, Baby Girl had already developed a substantial bond with Appellants in the first critical months in her life. Baby Girl's overriding interest in stability and continuity of care must remain in the forefront of this analysis.

In addition to the evidence which supports the statutory grounds for willful failure to visit and support, I also note Father's parental history with his other minor daughter, which reflects a disregard to fulfill parental obligations. The mother of his first child was forced to take court action after Father had amassed a child support arrearage of approximately $11,000. Given the totality of the evidence, placement with Father is not in Baby Girl's best interests. Father's established abandonment of parental responsibilities signifies "that he is consciously indifferent to the rights—and emotional needs—of his infant daughter . . . ." *Doe v. Roe*, 386 S.C.624, 633, 690 S.E.2d 573, 578 (2010).

In contrast, Appellants have provided Baby Girl a loving, nurturing, and stable home. The evidence of their parental fitness is overwhelming. State law is clear that it is the child's interests which shall prevail. *See* S.C. Code Ann. § 63-7-2570. Accordingly, I conclude placement with Appellants would serve the best interests of Baby Girl.

3.

Heightened Protections of ICWA

Were the termination of Father's parental rights determined solely under state law, there would be no further inquiry. However, through ICWA, Congress has specifically afforded heightened protections in a termination of parental rights action. I discuss each of these protections in turn.

a.

Emotional Harm to Child

ICWA prohibits the termination of parental rights "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). The beyond-a-reasonable-doubt standard is different than the clear-and-convincing burden of proof required under state law. Thus, in an Indian child custody proceeding to which ICWA applies, a dual burden of proof must be met before a parent's rights may be terminated: the court must find beyond a reasonable doubt that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child, and the court must also find that clear and convincing evidence supports termination under the applicable state statutory ground. *Accord In re Elliot*, 554 N.W.2d 32 (Mich. Ct. App. 1996) (finding in a child custody proceeding involving an Indian child, a dual burden of proof must be met); *In re Bluebird*, 411 S.E.2d 820, 823 (N.C. Ct. App. 1992) (finding "a dual burden of proof is created in which the state provisions and federal

provisions must be satisfied separately"); *In re D.S.P.*, 480 N.W.2d 234 (Wis. 1992) (finding the goals of ICWA and goals of state law are properly harmonized through requiring a dual burden of proof).

The family court found Appellants failed to prove that Father's custody of Baby Girl was likely to result in serious emotional or physical harm to the child. Noting Appellants' expert did not interview Father and had never before conducted a bonding evaluation on an Indian child, the family court gave little weight to his expert testimony. The family court further reasoned that the testimony was entitled to little weight because Appellants' expert considered only the damage resulting from Baby Girl's removal from Appellants' care—not the harm caused by placement with Father. The family court relied heavily on the testimony of an employee of Cherokee Nation, who testified as to Cherokee Nation's position regarding termination of Father's parental rights.

Additionally, the court found Father has a "demonstrated" ability to parent effectively[68] and, therefore, is a fit and proper person to have custody of Baby Girl. Despite acknowledging that Appellants would surely be excellent parents were Baby Girl to remain in their custody, the family court concluded Appellants failed to meet their burden of proving Father's continued custody of Baby Girl would result in severe emotional harm to the child. The family court's conclusion that Appellants failed to satisfy section 1912(f) was error.

At trial, Appellants presented the testimony of Dr. Bart Saylor, a qualified expert in familial bonding who conducted a bonding evaluation of Appellants

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[68] This finding contains no support in the record.

and Baby Girl, testified that both adoptive parents seemed very well-adjusted, Baby Girl was a healthy little girl, and there was a strong emotional and psychological bond between them. He testified that severing the bond Baby Girl has formed with Appellants would, beyond a reasonable doubt, be "very traumatic" and "very disruptive" for the child. He further opined that severing that bond could produce "depression, anxiety, [and] it could cause disruption in [Baby Girl's] capacity to form relationships at a later age." Dr. Saylor concluded that her removal would "be taking away everything that she had come to know and count on for her comfort and security and replace it with something that would be completely unfamiliar and strange to her." Dr. Saylor further articulated that "it's not a matter of an alternative being favorable or unfavorable, you know, better or worse. It's just taking away what has been the very source and foundation of her security in her life . . . ."

When asked during cross examination his opinion about Baby Girl's ability to bond with her biological family, Dr. Saylor testified that the fact that Baby Girl is healthy and happy bodes well for her resilience; however, he quickly cautioned that a substantial source of such health was her healthy and stable relationship with Appellants. In fact, Dr. Saylor stated the bond is "a good resource in this child's psychological armament, but all the more sense of loss and disruption of losing that" will occur if the bond is severed.[59]

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[59] Dr. Saylor further explained:

> Could it be that if she'd had multiple caregivers and the bond was less well established, it might be easier for her to

Dr. Saylor admitted he was unfamiliar with any specific studies suggesting a pattern of harm suffered by Native American adolescents who were raised by non-Indian adoptive families; he nevertheless testified that he would find such broad-based presumptions of "minimal utility in making that sort of a risk-assessment prediction." Although not discounting the significance of cultural heritage, Dr. Saylor noted that in terms of a child's bond with her caregiver, "it wouldn't have any relevance one way or the other to this bonding assessment, whether it was Native American, African American, European [heritage], that—that would not be the issue." Essentially, the relevant consideration in a bonding assessment is the family unit—the bond among the unique individuals, which is not necessarily defined by their cultural identity. Rather, according to Dr. Saylor, "the real variable that determines [children's] happiness and their success and their identity is that loving interaction with [their] family." Dr. Saylor ultimately opined that he believed beyond a reasonable doubt that the removal of Baby Girl from Appellants care would cause serious emotional harm. I find Dr. Saylor's testimony is credible and persuasive.

On behalf of Cherokee Nation, Tiffany Dunaway, an employee and case worker with the tribe, testified the tribe's recommendation was for Baby Girl to be

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> make another transition, I mean, possibly so. She might not be as healthy and happy a child on the surface, but making the transition might be easier. But I just don't think you can say that because she's happy and has been a well-cared for child that that would make it easier. *I think it could actually make it harder.*

(emphasis added).

placed with her natural father.[60] Dunaway was qualified as an expert in Cherokee Indian culture and Cherokee Indian practices. Dunaway received a bachelor's degree in family life education, but she has no formal training on bonding and attachment. In preparation for trial, she never met or evaluated Baby Girl or Appellants and she met Father only once briefly. Additionally, Dunaway admitted that she had never seen Father interact with *any* child of *any* age. Nevertheless, Dunaway was certain that Baby Girl would do well in Father's custody and would not be permanently harmed by severance of the bond Baby Girl has established with Appellants. Dunaway admitted she had no information about Father's ability to parent; nonetheless, she testified, "I have no doubt that this father [can] raise his child." Dunaway's opinion was based on a home visit she conducted with Father and paternal grandparents and a separate home study of the paternal grandparents, conducted while Father was not residing there.[61] Further, Dunaway acknowledged her opinion that Baby Girl would thrive if placed in

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[60] The bulk of Ms. Dunaway's testimony concerns the preference of Cherokee Nation regarding Baby Girl's adoptive placement. However, section 1912(f) does not contemplate the consideration of tribal preference in determining harm suffered by the child.

[61] Dunaway distinguished a "home assessment," which she conducted in this case, from a "full-blown home study," which she acknowledged she is not qualified to perform without additional training and certification. It appears the home study of paternal grandparents was conducted by another employee of Cherokee Nation for the purpose of approving paternal grandparents as an alternative placement during Father's military service. Dunaway explained that a home study of Father was not conducted because "[the tribe] didn't need one on him," notwithstanding her admission that the tribe had no information regarding Father's ability to parent.

that home was based on anecdotal experience alone. Dunaway admitted she was unaware of any studies that show the percentage of transitioned children who thrive long-term following reunification with their Indian families. On cross-examination, the following exchange took place:

> Q. When you said yesterday that Baby Girl would just do wonderful at [Father's], you really don't know that for sure, do you?
>
> A. And-and I think I said that. I think I said, you know, we don't know what the future is going to be. I've transitioned children her age and that are older than her and they thrive. They've done well. So I can only go off of my experience on that.
>
> Q. Your personal experience?
>
> A. Yes, through work.
>
> Q. And—and you've not had any children who didn't thrive?
>
> A. You know, I've had children who've had difficult times.
>
> Q. How many? Because yesterday you said they all were successful.
>
> A. I – you know, well they—they are successful. I think the children are thriving. I think there are a couple of girls who were—they're—I think they're 12 and 8 now. At first they were needing counseling. They, you know, they were older.
>
> Q. Right. I don't want to get into anecdotal. Give me statistics.
>
> A. I don't have those.

Q. Give me some hard statistics and don't tell me personal stories. Tell me how many children are not thriving?

A. I don't have those.

Q. Why wouldn't you?

A. I don't keep those.

Q. You don't really know, do you?

A. I don't keep those things.

Q. You don't know. So yesterday when you said they were all successful you don't really know how many of those are successful today, do you?

A. No, I don't.

. . . .

Q. But as you sit here today to testify you don't really have any studies completed or in your file in terms of a two-year old being taken out of a primary caregiver's home, a two-year old who only knows this couple as [] their only psychological parent, her only psychological parent, you don't have any studies in your file as to how the children you've monitored have done when they've been ripped out of an adoptive family's home and placed into someone's she doesn't even know?

A. I can only testify as to my experience.

[witness instructed by court to answer the question]

A. No, we do not have statistics. And the Tribe may have statistics; I don't have them. I can just-So, no, I do not have them.

Q. So you're prepared to say that this child who has never been with the biological father should be removed from the home that this child was—the only home that this child has known and put into an entirely strange environment with a father where there's no information about his ability to parent?

A. Yes.

Yet the family court was persuaded, as is the majority, by Dunaway's testimony. While I believe Dunaway's testimony reflects insight into Cherokee Nation's traditions and an understanding of the importance of cultural heritage in an Indian child's development, with respect, I find Dunaway's views, expressed as a representative of Cherokee Nation regarding the tribe's placement recommendation, are not persuasive in this case as they relate to the determination of whether Baby Girl would suffer harm if removed from Appellants' custody. Further, in light of her lack of expertise in the area of bonding, her lack of interaction with Baby Girl and Father, and her reliance on purely anecdotal evidence, I find Dunaway's opinion regarding Baby Girl's emotional well-being lacks credibility. *See In re Robert T. v. Devon T.*, 246 Cal. Rptr. 168 (Cal. Ct. App. 1988) (approving the family court's failure to give weight to an expert witness's testimony regarding lack of harm to child when witness had never met child or adoptive family). Thus, on the whole, I find Dunaway's testimony unpersuasive.

Respondents argue Dr. Saylor's expert testimony should have been excluded because he was not a qualified expert under ICWA due to his lack of

knowledge specifically related to Indian culture. I reject Respondents' contention that Dr. Saylor was not properly qualified as an expert. While I acknowledge testimony of an expert witness who possesses knowledge of Indian culture may be helpful, it is not required by section 1912(f). Moreover, where the basis for termination of parental rights is unrelated to Indian culture, the need for expert testimony possessing a familiarity with such culture becomes less crucial. *See Marcia V. v. State*, 302 P.3d 494, 504 (Alaska 2009) (stating "when the basis for termination is unrelated to Native culture and society and when any lack of familiarity with culture mores will not influence the termination decision or implicate cultural bias in the termination proceeding, the qualifications of an expert testifying under § 1912(f) need not include familiarity with Native culture"); *see also* Bureau of Indian Affairs ("BIA") Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67594 (1979) (indicating expert testimony by someone that has knowledge of tribal cultural and childrearing practices may be valuable to a court, but is not required). Furthermore, I see no basis for finding that severing the bond between a two-year old Indian child and the only caregivers she has ever known would be less traumatic and disruptive than if the child were a non-Indian.[83]

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[83] The majority finds it would be inappropriate to consider the bonding that occurred between Baby Girl and Appellants during litigation, and cites Holyfield in support of this finding. However, I view this as another instance in which the majority misapprehends that opinion.

In *Holyfield*, the adoptive parents argued the bonding which took place during the pendency of the litigation defeated the

tribe's exclusive jurisdiction. The United States Supreme Court found the express language of section 1911(a) could not be ignored in spite of the potential finding of the tribal court upon remand that the Indian children should be removed from their non-Indian adoptive home. In that vein, the Supreme Court stated:

> Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of who should make the custody determination concerning these children—not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court. Had the mandate of [section 1911(a) of] the ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." It is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe-and perhaps the children themselves-in having them raised as part of the Choctaw community. Rather, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy."

Holyfield, 490 U.S. at 53-54 (quoting *In re Adoption of Halloway*, 732 P.2d 962, 971-72 (1986) ("While stability in child placement should be a parmount value, it cannot be the sole yardstick by which the legality of a particular custodial arrangement is judged. . . . In any event, here we have no choice in the matter: [section 1911(a)] prohibits the Utah courts from exercising jurisdiction. Instead, we must defer to the experience, wisdom, and compassion of the Navajo tribal courts to fashion an appropriate remedy. We hope the tribal courts will consider the tribe's slow response to the notice of the Utah adoption proceedings as well as the value of stability in child placement and will recognize the strong bonds [child] has developed with his adoptive parents. . . . [W]e are confident that the courts of the Navajo Nation will give the petition for adoption the careful

I also find the family court improperly interpreted section 1912(f)'s "damage" as encompassing only long-term harm. Section 1912(f) contains no such limitation on the damage requirement. By its terms, section 1912(f) requires only proof of serious emotional or physical harm to the child. I believe this particular provision of ICWA is designed specifically to protect the best interests of the child, which necessarily includes the child's short-term well-being. This does not mean, however, long-term considerations are irrelevant. Dr. Saylor opined that severing the bond between Baby Girl and Appellants had the potential to negatively affect Baby Girl as an adult. However, Dr. Saylor candidly acknowledged that long-term effects of such traumas are subject to a host of varying factors and are therefore unpredictable.[63]

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attention it deserves *and will act with the utmost concern for [child's] well-being.*") (emphasis added)).

Further, I note that, following remand to the tribal court in *Holyfield*, the Choctaw tribal court judge balanced the tribe's interests in preserving tribal communities against the children's interests in continuity and stability, and concluded it was in the children's best interests to remain with the non-Indian adoptive parent. *See* Maldonado, *supra*, at 17-18. This lends further support for the proposition that the best interests inquiry is not ousted by ICWA and that bonding is a highly relevant consideration.

[63] Respondents additionally suggested through cross-examination of Dr. Saylor that his testimony should be discounted because he refused to "conclusively" testify that Baby Girl would suffer "irreparable harm" if Father were awarded custody. I reject this effort to discount Dr. Saylor's testimony. The statute imposes a beyond a reasonable doubt standard and speaks in terms of "serious harm," not irreparable harm. In addition, I find Dr. Saylor's measured responses and caution against making broad generalizations reflective of an objective and credible expert witness. Dr. Saylor's measured responses

Finally, I find the family court erred in discounting Dr. Saylor's testimony because he attributed Baby Girl's emotional harm to only her removal from Appellants' care and not her return to Father's care. Initially, although Father never assumed or sought physical custody of Baby Girl, I recognize, as have other courts, that "continued custody" under section 1912(f) refers not only to physical custody, but legal custody as well.[64] *See D.J. v. P.C.*, 36 P.3d 663 (Alaska 2001) (noting section 1912 termination provisions are applicable even where parent never had physical custody but whose custodial rights had not been terminated); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 938 (N.J. 1988) ("[T]he reference to 'custody' in section 1914 refers to a parent's legal, rather than physical, relationship with a child."). Nonetheless, it is apparent from the circumstances before us that section 1912 must be applied in the context of the facts of the particular case. The critical feature here is that Father deliberately avoided developing a parent-child relationship with Baby Girl. Thus, no father-daughter relationship exists upon which to base an evaluation.

Here, Father chose not to be a parent for an extended period of time. In addition, there is compel-

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and candor are refreshing when contrasted with the "all in" expert, like Dunaway.

[64] The majority asserts that the "plain language" of section 1912(f) "requires a showing that the *transferee* parent's *prospective* legal and physical custody is likely to result in serious damage to the Indian child." (emphasis added). Section 1912(f) says no such thing. The majority's attempt to engraft into the statute the terms "transferee" and "prospective" must be rejected. The text of section 1912(f) requires a showing that "the *continued* custody of the child by the parent or Indian custodian" would result in emotional harm to the child. (emphasis added).

ling evidence that Baby Girl would suffer serious emotional damage if removed from the physical custody of Appellants. In this case, although the record raises substantial questions as to Father's fitness as a parent, ICWA does not require the presentation of additional evidence showing that a biological parent could not provide a good home for the child. *See In re Adoption of Baade*, 462 N.W.2d 485, 490-91 (1990) (reasoning that if parent retained legal custody of the child, the adoptive couple would be unable to adopt him and would have no basis for maintaining physical custody; as a result, the father's continued legal custody would result in the child having to leave the adoptive couple, which would produce serious emotional damage). Thus, "[w]hen the child is not in the custody of the parents for a protracted period of time, as in this case, it would be irrelevant to receive testimony as to whether or not the continued custody of the child by the parents will harm the child." *In re the Interest of D.S.P.*, 480 N.W.2d 234, 240-41 (Wis. 1992). I would adopt this well-reasoned approach. Since Father has never made meaningful attempts to establish a relationship with Baby Girl, the distinction drawn by the family court is incongruous with the facts before us. I therefore find the appropriate analysis of section 1912(f) requires only an examination of the likelihood of serious emotional harm if the child were removed from Appellants, the sole caregivers Baby Girl has ever known.

In light of Dr. Saylor's testimony regarding the deep and nurturing bond formed between Appellants and Baby Girl, if Father were to retain continued legal custody, thereby preventing Appellants from retaining physical custody of the child, I am persuaded beyond a reasonable doubt that Baby Girl would suffer severe emotional harm. Thus, I conclude Appel-

lants have satisfied the requirements of section 1912(f).

b.

Active Remedial Efforts

In addition to other protections afforded by ICWA, section 1912(d) requires that, before a parent's rights may be terminated, a court must determine if active efforts to provide remedial services have been made. Specifically, that section states:

> Any party seeking to effect a . . . termination of parental rights to[] an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

25 U.S.C. § 1912(d). The remedial efforts should be directed at remedying the reason that led to removal. *Adoption of Hannah S.*, 48 Cal. Rptr.3d 605, 612 (Cal. Ct. App. 2006); *see also Matter of Baby Boy Doe*, 902 P.2d 477 (Idaho 1995) (holding that the types of remedial and rehabilitative services to be required under ICWA depend on the facts of the case).

The legislative history of subsection (d) suggests that Congress intended for the Federal standard regarding active efforts to mirror state law standards after which it was patterned:

> The committee is advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This subsection imposes a Federal

> requirement in that regard with respect to Indian children and families.

H.R. Rep. No. 1386, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7545. *See also Adoption of Hannah S.*, 48 Cal. Rptr.3d 605 (finding active efforts are essentially equivalent to reasonable efforts to provide reunification services under state law); *In re Baby Boy Doe*, 902 P.2d 477 (accord). Like most states, South Carolina requires reasonable efforts to be made to reunify a family following the removal of a child from a parent's custody. *See* S.C. Code Ann. § 63-7-1640 (South Carolina's family preservation statute setting forth requirement that "reasonable efforts to preserve or reunify a family" have been made by Department of Social Services).

Initially, it is clear Congress envisioned section 1912(d) to apply in the removal context. *See Holyfield*, 490 U.S. at 32 (noting the legislative history of ICWA demonstrates Congress was concerned with "the wholesale *removal of Indian children from their homes*, the most tragic aspect of Indian life today" (emphasis added) (internal quotations omitted)). Likewise, in terms of the state standards referenced in the House Report, South Carolina's reasonable efforts requirement is applicable when a child has been removed from the parent's custody. *See* S.C. Code Ann. §§ 63-7-1640 (noting child's health and safety are the paramount concern with regard to state's reasonable efforts to preserve or reunify a family); 63-7-2570(2) (establishing that parent must comply with terms of state plan and remedy the conditions which caused removal).[85] To be clear, I do not

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[85] Further connecting the provision of rehabilitative services to the removal context, such services may also be offered to parents proactively to prevent a child's removal in the first

find the absence of a removal action in the traditional sense dispositive of the active efforts requirement of section 1912(d); however, I merely acknowledge the reality that because the circumstances before us do not involve removal, the application of section 1912(d) is not straightforward. *See In re J.S.*, 177 P.3d 590 (Okla. Civ. App. 2008) (finding the active efforts provision of section 1912(d) eludes definition and therefore should be determined by courts on a case-by-case basis). As an additional difficulty, the parties seeking the termination of parental rights are Appellants, not the state. I acknowledge that the absence of the state social services agency as a party to this proceeding does not render section 1912(d) inapplicable; however, as a practical hurdle, its resources cannot be utilized to comply with the active efforts requirement. Overwhelmingly, most cases applying section 1912(d) encompass issues relating to vocational rehabilitation, alcohol or substance abuse, mental health issues, lack of parenting skills, or domestic violence allegations, all of which may be treated through counseling and education provided through child protection agencies. *See, e.g., In re K.B.*, 93 Cal. Rptr. 3d 751 (Cal. Ct. App. 2009) (noting that county department of public social services satisfied the active efforts requirement where department provided mother with referrals to inpatient substance abuse program, parent class, homemaking assistance, and a class designed to educate parents on issues of sexual abuse); *In re Interest of Walter W.*, 744 N.W.2d 55 (2008) (affirming finding that state department's case manager assisted mother in

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instance. *See* S.C. Code Ann. § 63-7-1650 (permitting state to provide services to abused and neglected children without the removal from custody).

locating and applying for inpatient chemical dependence programs, provided list of job skill development programs, referred her for a mental health evaluation, assisted her in finding housing, and provided bus tickets for transportation to Alcoholics Anonymous, Narcotics Anonymous, and visitations with her child).

In the case before us, termination of parental rights is sought on the basis of Father's willful abandonment of parental rights and responsibilities. Yet, Father claims active efforts were not offered because he was not advised of his parental rights, Mother concealed her plan for adoption, no one ever demanded child support from him, and a child support proceeding was not initiated. I find disingenuous Father's claimed lack of awareness of his parental rights—by his own admission he knew of Mother's pregnancy and was informed of Baby Girl's expected due date. In fact, Father relies on his early acknowledgement of paternity in support of his claim as an ICWA parent pursuant to section 1903(9).

I further find Father's expectation to be notified of Mother's adoption plan is unreasonable in light of his expressed desire (verbally and in writing) to "give up" his parental rights and his prolonged failure to inquire about the child after her birth. Moreover, Father undoubtedly knew of the adoption when he was served with pleadings in this lawsuit in January 2010. Yet, other than his intervention in the adoption proceeding, his conduct towards Baby Girl remained unchanged until February 2011 when he first attempted to support the child.[66]

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[66] This Court has previously stated:

For purposes of invoking constitutional and statutory protections afforded an unwed father, a father's support for an expected child is an obligation that arises at the instant the father learns of the pregnancy and continues after the child's birth. It is of no moment that a father is under no family court order requiring support payments. *See S.C. Dep't of Soc. Servs. v. Cummings*, 345 S.C. 288, 547 S.E.2d 506 (Ct. App. 2001) (finding formal notice of a parental duty to support is not required before failure to discharge such duty may serve as grounds for termination of parental rights); *S.C. Dep't of Soc. Servs. v. Parker*, 336 S.C. 248, 258, 519 S.E.2d. 351, 356 (Ct. App. 1999) ("[N]othing in [63-7-2570] requires a parent be 'notified' of his duty to support or visit [child] before failure to discharge those duties may serve as grounds for termination of parental rights."). This settled law stands in contrast to the family court's finding that Father's parental rights would not be terminated under state law for failure to support because, in part, Appellants never requested support from Father.

Further affecting the active efforts requirement is the basis for termination of Father's parental rights—his abandonment of Baby Girl. Father claims his abandonment was conditioned on his belief that Mother would raise the child—not place her for adop-

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> Even in the most acrimonious of situations, a[n unwed] father-to-be can fund a bank account in the mother-to-be's name. He can have property or money delivered to the mother-to-be by a neutral third party. He can—and must—be as creative as necessary in providing *material assistance* to the mother-to-be during the pregnancy and, the law thus assumes, to the child once it is born.

Reeves, 392 S.C. at 153, 708 S.E.2d at 783.

tion. Now Father contests Baby Girl's adoption and argues termination of his parental rights is improper because active remedial efforts have not been made to prevent the breakup of his family. I do not follow Father's logic. The breakup of the Indian family does not turn on whether Baby Girl is raised by her mother or by Appellants—rather, the breakup of Father's Indian family was occasioned by Father's unwillingness to become involved in the child's life, a decision he made long before he learned of the adoption proceedings. *See In re N.B.*, 199 P.3d 16, 25 (2007) ("The active efforts inquiry [of section 1912(d)] focuses on *reunifying* the broken Indian family." (emphasis added)).

A finding of abandonment necessarily encompasses "conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *Hamby v. Hamby*, 264 S.C. 614, 617, 216 S.E.2d 536, 538 (1975). As the family court found in this case:

> During [Mother's] pregnancy and after the child's birth, [Father] was a full time member of our military, earning income. Though he had the ability to do so, he never attempted to offer any type of meaningful support to [Mother] or his child. In essence, prior to being served with the adoption lawsuit when the child was four months old, [Father] made no "meaningful attempts" to assume his responsibility of parenthood . . . .[67]

Under the facts presented, I ask: what active efforts are envisioned under section 1912(d) where, as here, the parent has consistently avoided parental

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[67] Despite this finding, the family court concluded Father did not willfully fail to support the child under state law.

rights and responsibilities? In my judgment, it would defy common sense and ignore the reality of the facts of this case to construe Congressional intent to mandate a futile act. Because active efforts are aimed at remedying the conditions which threaten the parent-child relationship, in my opinion, Father's unilateral abandonment cannot be corrected by remedial services or rehabilitative programs. *See Adoption of Hannah S.*, 48 Cal. Rptr.3d at 612 (finding party seeking termination of parental rights was not required to make active efforts based on father's abandonment and felony convictions resulting in a prison term). Appellants cannot reasonably be expected to provide such services to someone who has expressed, in both actions and words, an unwillingness to form a parent-child relationship. *See In re Welfare D.K.*, No. A10-550, 2010 WL 4181454, at *2 (Minn. Ct. App. Oct. 26, 2010) (affirming family court's ruling that active efforts were made in part because father had not visited child in over a year despite living near the child, missed a scheduled visit without explanation, and father's failure to visit was attributable to his subjective feelings that visiting was inconvenient rather than to county's failure to provide assistance); *In re Children of J.W.L.*, No. A05-20, 2005 WL 1804833, at *6 (Minn. Ct. App. Aug. 2, 2005) (holding social workers' efforts would have been futile in part because father never had a relationship with children, initially denied paternity as to both, and had previously shown no interest in being a parent).[68]

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[68] In rejecting futility as an option under section 1912(d), the majority states that Father must receive rehabilitative services even if one assumes "Father did not want custody of Baby Girl and did not desire to act as a parent to her." What the majority

Any "rehabilitation" or attempt at curing Father's refusal to undertake the responsibilities that come with being a parent was squarely and completely within his own control. *See Reeves*, 392 S.C. at 150, 708 S.E.2d at 728 ("[I]t is only if [a father] grasps that opportunity and accepts some measure of responsibility for the child's future may he enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."); *Abercrombie v. LaBoon*, 290 S.C. 35, 348 S.E.2d 170 (1986) (finding curative conduct after initiation of an action for termination of parental rights

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expresses as an assumption is in fact the reality of this case. Lost in the academic discussion and rigid application of legal principles is a child whose birth father abandoned her from the moment he learned of the pregnancy. The majority construes ICWA to require active remedial efforts to an Indian parent regardless of the facts. I could not disagree more strongly, as I believe Congress intended section 1912(d) to be construed through the lens of the facts of the particular case and the best interests of the Indian child. The majority's rigid approach to section 1912(d) cannot be reconciled with an approach that seeks a result consistent with the best interests of the Indian child. I am simply not persuaded that application of section 1912(d) is meant to relieve a parent of a purposeful decision not to be a parent, which is a decision that is entirely unconnected to any need for rehabilitative services. Given Father's purposeful decision to abandon parental rights and responsibilities, I find absurd the Court's suggestion that Appellants should have "attempt[ed] to stimulate Father's desire to be a parent or to provide necessary education regarding the role of a parent." I view this as requiring not merely efforts to rehabilitate a nonexistent parent-child relationship, but rather to perform a miracle. The Court's suggestion illustrates the futility of providing rehabilitative services in this case. It is a tragic end that Appellants, whose conduct is implicitly characterized as unlawful, are now blamed for not "stimulating" Father to become a real parent.

may be considered by the court, but only rarely would such judicially motivated repentance standing alone warrant a finding that an abandonment was cured). Accordingly, in line with other courts that have reached the same conclusion, I believe it is unnecessary to require a showing of reunification efforts because such efforts would be futile under these circumstances. *See, e.g.*, *In re N.B.*, 199 P.3d at 25 ("The facts showing abandonment will vary widely from case to case, and determining futility in any given case would be a factual matter necessarily left to the trial court.") (citing *In re Baby Boy Doe*, 902 P.2d at 484).

Although I have previously examined Father's abandonment at length, I mention it again only to point out that, at the time Baby Girl was placed with Appellants, there was no indication Father had any interest in grasping his opportunity as a parent. To the contrary, every indication from Father was that he was totally uninterested regarding Baby Girl's future and well-being and that he wished to "give up" his parental rights. Further, in the Oklahoma action, Father's initial complaint indicated that neither he nor Baby Girl were Native American, and stated ICWA was inapplicable.[69]

While I recognize ICWA's laudable policy of preserving and reunifying American Indian families where possible, I cannot accept that Congress intended to force superfluous attempts aimed at mending nonexistent parent-child relationships. Certainly, the Act "does not do so at the expense of a child's right to security and stability." *In re C.A.V.*, 787 N.W.2d

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[69] I fully appreciate that Father's complaint was later amended to allege ICWA's applicability.

96, 104 (Iowa Ct. App. 2010). Application of section 1912(d) is not meant to relieve a parent of a purposeful decision not to be a parent, which is a decision that is entirely unconnected to any need for rehabilitative services and unrelated to the unique familial and child-rearing culture of the Cherokee Nation. Accordingly, I conclude no efforts could have prevented the breakup of this Indian family.

Based on the foregoing, I would terminate Father's parental rights with respect to Baby Girl in accordance with section 63-7-2570 of the South Carolina Code and section 1912 of ICWA.

D.

Adoptive Placement

A termination of Father's parental rights does not end this matter. It must be determined if adoption of Baby Girl by Appellants is appropriate in light of ICWA's adoption placement preferences. ICWA mandates that

> In any adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

25 U.S.C. § 1915(a) (emphasis added). Congressional history indicates that "[Subsections 1915(a) and (b)] establish a Federal policy that, where possible, an Indian child should remain in the Indian community, *but is not to be read as precluding the placement of an Indian child with a non-Indian family*." H.R. Rep. No. 1386, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546 (emphasis added). The

emphasized language is, in my judgment, tied to the underlying Congressional intent to serve the best interests of the child.

Cherokee Nation contends Appellants' motion to finalize the adoption of Baby Girl should be denied because they failed to establish good cause to deviate from the placement preferences set forth in section 1915. According to the tribe, Appellants failed to demonstrate any of the factors set forth in BIA Guidelines warranting deviation from the preferences set forth in section 1915.[70] At oral argument before this Court, counsel for Cherokee Nation stated "The [Appellants] would be the last people available to adopt this child even if [Father] was out of the picture." That statement is chilling, for it demonstrates the tribe's lack of concern for the best interests of this unique child. I note that paternal grandparents are not parties to this action, and although Cherokee Nation has intervened and expressed its recommendation regarding adoptive placement of Baby Girl, that recommendation is not dispositive. *See In re J.R.S.*, 690 P.2d 10, 17 (Alaska 1984) ("ICWA entitles the tribe to influence over adoptive placements, not to adoptive rights themselves.").

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[70] The BIA Guidelines offer examples of the kinds of factors that can provide good cause to deviate:

> (i) The request of the biological parents or the child when the child is of sufficient age.
>
> (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
>
> (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

BIA Guidelines, 44 Fed. Reg. 67584, 67594 (1979).

I believe that the Indian child's best interests are of primary consideration in adoption proceedings, notwithstanding the tribe's preference to the contrary. *See* S.C. Code Ann. § 63-9-20 (stating that in adoption proceedings "when the interests of a child and an adult are in conflict, the conflict must be resolved in favor of the child."); *In re Appeal in Maricopa Cnty. Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Az. Ct. App. 1983) (finding ICWA's declared policy emphasizes that the first interest Congress seeks to protect is that of Indian children); *see also* 25 U.S.C. § 1902. "[I]t is patently clear that Congress envisioned situations in which the child's best interest may override a tribal or family interest . . . ." *Maricopa Cnty.*, 667 P.2d 228, 234 (Az. Ct. App. 1983) (quoting 25 U.S.C. § 1915(a), (b)).

Further, the BIA Guidelines may assist the Court, but they are not binding, nor are they an exhaustive list. *See* BIA Guidelines, 44 Fed. Reg. 67584, 67594 (1979) ("[T]hese guidelines . . . are not published as regulations because they are not intended to have binding legislative effect."). Although ICWA and the BIA Guidelines draw attention to relevant considerations, the best interests of the child remain paramount.[71] *See Adoption of N.P.S.*, 868 P.2d 934 (Alaska

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[71] The majority finds that Appellants' showing of good cause must be ignored because Baby Girl was unlawfully removed from Oklahoma shortly after her birth and wrongfully placed with Appellants in South Carolina, such that any subsequent bonding cannot be relied upon to establish good cause. Further, the Court faults Appellants for failing to notify the tribe that Baby Girl was to be removed from Oklahoma and cites to the Cherokee Nation's sovereign authority in determining the fate of its children.

While I have previously expressed my frustration with the Court's misreading of *Holyfield* and resurrection of unappealed

1994); *Maricopa Cnty.*, 667 P.2d 228 (Az. App. 1983); *In re Interest of Bird Head*, 331 N.W.2d 785 (Neb. 1981).

I would hold that good cause exists to deviate from the adoptive placement preferences of section 1915(a). Baby Girl has resided with Appellants for two years. A close parent-child relationship with each of the adoptive parents has been established, and her removal would cause severe emotional damage. *See Maricopa Cnty.*, 667 P.2d at 234 (affirming family court's finding of good cause where the child had resided with the adoptive mother for three years, that a close mother-child relationship had been established, and that the baby's removal would cause psychological damage). Additionally, Mother has consistently expressed her desire that Baby Girl be placed with Appellants. ICWA expressly provides that courts should consider the preference of a parent.[72] *See* 25 U.S.C. § 1915(c) ("Where appropriate,

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rulings, I am compelled to note that Baby Girl was removed from Oklahoma only after receiving a letter from Cherokee Nation indicating that she would not be considered an Indian Child and that ICWA was not applicable. Although Cherokee Nation cannot be penalized for receiving incomplete information in the intitial inquiry, it likewise cannot be rewarded for engaging in the most cursory of investigations into this child's heritage, notwithstanding Mother's unequivocal assertions that Father was an enrolled member of the Cherokee Nation. I construe the events following that initial response from Cherokee Nation as Appellants' good-faith reliance on the tribe's representations that Baby Girl was not Cherokee and ICWA was not applicable. Ignoring the bonding that occurred here is simply ignoring the reality of this case.

[72] By way of supplemental citation, Father contends Mother's preference that Baby Girl be placed with Appellants is, standing alone, insufficient to constitute good cause warranting deviation from section 1915(a). *See In re T.S.W.*, 276 P.3d 133 (Kan. 2012)

the preference of the Indian child or parent shall be considered . . ."); *see also In the Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993) (holding mother's preference for placement with non-Indian, adoptive parents was appropriate factor in finding good cause). Moreover, Appellants have expressed and demonstrated a desire and willingness to introduce Baby Girl to her Indian culture.[73] Section 1917 permits an adopted Indian child to receive information on his or her "tribal affiliation . . . and . . . such other information as may be necessary to protect any rights flowing from the individual's tribal relationship" upon reaching the age of eighteen. 25 U.S.C. § 1917. Thus, I am persuaded that Baby Girl will have a knowledge of and appreciation for her cultural heritage. *See In re Robert T.*, 246 Cal. Rptr. at 176 (holding that the Native American child's best interests were to remain with his adoptive parents since they have bonded well and have encouraged him to learn about and visit his cultural roots).

In light of the totality of the evidence, including the strong emotional parent-child bond formed between the Appellants and Baby Girl, the harm that would be caused if Baby Girl were removed from the only parents she has ever known, Mother's expressed

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(holding placement preference of birth mother alone does not constitute good cause to deviate from placement preferences under ICWA). I do not disagree. Although I recognize that the placement preference of a birth mother standing alone may be insufficient, here, Mother's preference, although certainly relevant, is only one of several factors in my analysis. The totality of the circumstances, in my judgment, compels a finding of good cause to deviate from the section 1915 placement preferences.

[73] I reject Cherokee Nation's contention that the interests of an Indian child are always better served by placement with an Indian family.

preference, and Appellants' dedication to exposing the child to her Indian heritage, I would hold good cause exists to deviate from the placement preferences of ICWA.

IV.

CONCLUSION

I dissent and would reverse the judgment of the family court. I would terminate Father's parental rights pursuant to section 63-7-2570 of the South Carolina Code of Laws and in accordance with ICWA. Additionally, I would hold there is good cause to deviate from ICWA's adoptive placement preferences and remand for an immediate entry of judgment approving and finalizing the adoption of Baby Girl by Appellants. And finally, I would require the immediate return of Baby Girl to Appellants.

HEARN, J., concurs.

JUSTICE HEARN: Without hesitation, I join Justice Kittredge's thoughtful, well-reasoned, and excellent dissent. Like Justice Kittredge, I view both the pertinent facts of this case—facts which emanate solely from Father's conduct—and the legal principles underlying termination of parental rights and adoption as requiring judgment in favor of Adoptive Couple. My review of the record convinces me that Father turned his back on the joys and responsibilities of fatherhood at every turn. I would not minimize, as the majority does, the telling fact that Father told Mother in writing after Baby Girl's birth that he would relinquish his parental rights rather than support her and Baby Girl, and I do not join the majority in accepting his laughable explanation that he did this as a way to convince Mother to marry him. In stark contrast to Father's behavior in completely shirking his parental responsibilities, every action taken by Adoptive Couple since they learned she was going to be their child has demonstrated their deep and unconditional love and commitment to Baby Girl. Nevertheless, today, the majority goes out of its way to re-cast the facts in a light unfavorable to Adoptive Couple and overlooks Father's clear course of conduct, affording him a second chance at fatherhood, all at great emotional cost to Baby Girl and Adoptive Couple.

Apart from the human tragedy that Father's reluctance to act like a father until the eleventh hour has wrought on Baby Girl, Adoptive Couple, and their extended family, I profoundly disagree with the majority's elevation of the Indian Child Welfare Act (ICWA) to a position of total dominance over state law and settled principles of the best interests of the child, a position which I find totally unsupported by ICWA jurisprudence. As Justice Kittredge demon-

strated, Father's last-ditch efforts to embrace a relationship with his daughter under the cloud of litigation are far too little and much too late. I cannot fathom that Congress intended ICWA to require the return of a child to a parent who consistently, by his words and actions, evinced a desire to forego his responsibilities as a father. I therefore wholeheartedly join Justice Kittredge's dissent and would order Baby Girl's return to Adoptive Couple.

KITTREDGE, J., concurs.

APPENDIX B

[REDACTED/FILED UNDER SEAL]

APPENDIX C

THE SUPREME COURT OF SOUTH CAROLINA

Appellate Case No. 2011-205166

ADOPTIVE COUPLE,
Appellants,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,
Respondents.

ORDER

The petition for rehearing in the above entitled matter is denied.

/s/ [Illegible] C.J

/s/ [Illegible] J.

/s/ [Illegible] J.

We would grant rehearing.

/s/ [Illegible] J.

/s/ [Illegible] J.

[Seal]
Columbia, South Carolina
August 22, 2012

OPPOSITION BRIEF

RECORD AND BRIEFS

SUPREME COURT, U.S. FILED NOV 30 2012 OFFICE OF THE CLERK

No. 12-399

In the Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Petition for a Writ of Certiorari to Supreme Court of South Carolina

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QUESTIONS PRESENTED

Respondents address the following questions:

1. Whether the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963, governs state proceedings to determine the custody of a minor who all parties concede to be an "Indian child" within the meaning of the Act.

2. Whether a father who satisfies state-law requirements to establish paternity qualifies as a "parent" under ICWA.

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BRIEF IN OPPOSITION

STATEMENT

Petitioners and their *amici* contend that the Court should grant review to resolve what they characterize as two conflicts in the state courts on the meaning of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963. That contention, however, is wrong on every level. On examination, one of petitioners' purported conflicts, concerning ICWA's use of the word "parent," simply has no bearing on the outcome of this case. And the other conflict, involving application of the so-called "existing Indian family doctrine," concerns the validity of a judicial construct that has been widely repudiated and is of limited and diminishing importance—which doubtless explains why petitioners *expressly waived* reliance on the doctrine in their argument to the South Carolina Supreme Court. As a consequence, the questions presented here, which were unanimously and correctly decided by the courts below, do not warrant this Court's attention. The petition should be denied.

A. Statutory background.

1. As this Court has explained, ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32 (1989). Oversight hearings found that "25 to 35% of all Indian children had been separated from their families and placed in adoptive

families, foster care, or institutions." *Ibid.* The adoption rate for Indian children was eight times that for non-Indians, and 90% of the adopted Indian children were placed in non-Indian homes. H.R. Rep. No. 95-1386, at 9 (1978). This crisis was exacerbated by what Congress described as state failure "to recognize the essential tribal r[illegible]ations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). In Indian communities, it is common for a child to "have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." H.R. Rep. No. 95-1386, at 10 (1978). Many state social workers, however, "consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." *Ibid.*

Overall, witnesses termed "[t]he wholesale removal of Indian children from their homes[] * * * the most tragic aspect of Indian life today." *Holyfield*, 490 U.S. at 32 (citation omitted). And while much of this testimony addressed "the harm to Indian parents and their children," "there was also considerable emphasis on the impact on the tribes themselves." *Id.* at 34. Faced with this evidence, Congress concluded in legislative findings that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). But it determined that "an alarmingly high percentage" of Indian children "are placed in non-Indian foster and adoptive homes and institutions." *Id.* § 1901(4).

2. Congress responded by enacting ICWA, which "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and

tribe in retaining its children in its society." *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23 (1978)). The statute declares it "the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children." 25 U.S.C. § 1902. ICWA effectuates this goal by, among other things, setting "procedural and substantive standards for those child custody proceedings that do take place in state court." *Holyfield*, 490 U.S. at 36.

Most important for present purposes, ICWA imposes a heightened evidentiary standard for terminating the parental rights of an Indian parent or custodian. This provision establishes that "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt * * * that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f) (the "Parental Termination provision"). ICWA defines the "parent" who is covered by this provision to include "any biological parent or parents of an Indian child," excluding "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). An "Indian child" whose custody proceeding is governed by ICWA is "any unmarried person who is under age eighteen[,] * * * is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

In addition, ICWA specifies a hierarchy of preferences in the placement of Indian children, providing

that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). See 25 U.S.C. § 1913(2) (listing members of extended family). These provisions collectively demonstrate "a Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37 (citation omitted).

B. Factual background.

This case involves a bitterly contested child custody dispute. Unsurprisingly, the parties and other participants offer very different accounts of the underlying facts (see, *e.g.*, Pet. App. 3a n.3, 4a n.4, 8a n.9), which were viewed quite differently by the majority and dissent in the South Carolina Supreme Court. The petition's factual account is taken principally from the dissent below; our factual statement, in contrast, follows that of the South Carolina Supreme Court majority and of the state Family Court, the latter of which took testimony and was in a position to assess the witnesses' credibility.

1. Father, respondent here, and Mother are the biological parents of Baby Girl. Father is a registered member of respondent Cherokee Nation. Pet. App. 104a. They were engaged at the time the child was conceived, while Father was serving in the United States Army and stationed at Fort Sill, Oklahoma. *Id.* at 105a. The Family Court found that Father "was excited to learn of the pregnancy and urged [Mother] to move the wedding date forward so that the child would be born during their marriage. In that way, she and the unborn child would have military health coverage during and after the pregnancy,

the family could obtain base housing, and his military pay would increase." *Ibid.* But the relationship became strained and Mother "broke off the engagement in May [2009] via text message" (*id.* at 3a), "end[ing] all contact and communication between herself and [Father]." *Id.* at 105a.[1]

In June 2009, "Mother sent a text message to Father asking if he would rather pay child support or surrender his parental rights. Father responded via text message that he would relinquish his rights, but testified that he believed he was relinquishing his rights to Mother." Pet. App. 4a. During this exchange, "Mother never informed Father that she intended to place the baby up for adoption. Father insists that, had he known this, he would never have considered relinquishing his rights." *Ibid.*[2]

In fact, however, "[a]t approximately the same time [Mother] ended her relationship with [Father], she made the unilateral decision to give up the unborn child for adoption. [Father] had no knowledge of her adoption plan." Pet. App. 105a. To the contrary, as described by the Family Court, "[a]ll attempts to contact [Mother] by [Father] and his family members

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[1] This brief cites to the Family Court opinion that is reprinted in the sealed petition appendix. Like the opinion of the South Carolina Supreme Court, this brief uses only pseudonyms in referring to the parties and contains no personal identifying information.

[2] Although petitioners declare that Father "voluntarily relinquished his parental rights via text message while the mother was pregnant" (Pet. 2), they fail to note that he did so in response to Mother's text message, after she had used text messages both to break their engagement and to request that he relinquish his parental rights or pay child support.

were refused by [Mother]. * * * It was clear that [Mother] wanted to have [Father] completely and permanently removed from her life and placing the child for adoption without his knowledge or consent would further this goal." *Id.* at 106a.[3]

Also in June 2009, Mother was introduced to petitioners ("Adoptive Couple"), a couple living in South Carolina, through an Oklahoma adoption agency. Mother testified "that she knew 'from the beginning' that Father was a registered member of the Cherokee Nation, and that she deemed this information 'important' throughout the adoption process." Pet. App. 5a. Nevertheless, "it appears that there were some efforts to conceal his Indian status" and the adoption agency's pre-placement form indicates that "[i]t was determined that naming him would be detrimental to the adoption." *Id.* at 6a. Although Mother's attorney provided the Cherokee Nation with father's name while inquiring whether the child would be an "Indian child" subject to ICWA, the attorney misspelled Father's first name (*ibid.*), and provided both the wrong day and the wrong year for Father's date of birth (*id.* at 106a); based on these misstatements, the Cherokee Nation responded that the child appeared not to be an Indian child, adding that any misinformation would invalidate that determination. *Id.* at 6a.

Baby Girl was born on September 15, 2009. The next morning, Mother signed forms relinquishing her parental rights and consenting to the adoption by Adoptive Couple. Pet. App. 7a. At the time, Adoptive

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[3] There was conflicting testimony on whether Father or his family attempted to contact Mother in the period before or immediately after Baby Girl's birth. See Pet. App. 8a & n.9.

Couple was required to receive permission pursuant to the Oklahoma Interstate Compact on Placement of Children (ICPC) as a prerequisite to taking Baby Girl to South Carolina. The necessary forms, signed by Mother, "reported Baby Girl's ethnicity as 'Hispanic' instead of 'Native American.'" *Ibid.* Following submission of this misinformation, Adoptive Couple received permission to take Baby Girl to South Carolina. The misstatements were essential to the progress of the adoption: Had the birth father's status as a member of the Cherokee Nation been known, neither the Cherokee Nation nor the Oklahoma ICPC agency would have consented to the removal of the child from Oklahoma. *Id.* at 7a-8a & n.8.

Petitioners filed this adoption action in South Carolina on September 18, 2009, three days after Baby Girl's birth. But they did not inform father of the proceeding for almost four months. At that time, "days before Father was scheduled to deploy to Iraq," a process server presented Father with legal papers outside a mall near his base stating that "he was not contesting the adoption of Baby Girl." Pet. App. 8a-9a. Upon realizing that Mother had relinquished her rights to petitioners, Father immediately consulted with a JAG lawyer at his base, retained a personal lawyer, sought a stay of the adoption proceeding, and began an action to establish paternity, child custody, and support of Baby Girl. *Id.* at 9a.[4] Within days of this development (and after giving his father power of attorney to conduct the suit), Father "was dep-

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[4] Father initially brought suit in Oklahoma but that action ultimately was dismissed on jurisdictional grounds. See Pet. App 9a-10a.

loyed to Iraq, where he served this country honorably during Operation Iraqi Freedom for a period of nearly one year" and received a Bronze Star for his service. *Id.* at 108a; see also *id.* at 3a n.2. Meanwhile, the Cherokee Nation identified Father as a registered member and intervened in the South Carolina adoption action pursuant to ICWA. *Id.* at 10a.

The Family Court ordered paternity testing, which conclusively confirmed that Father is Baby Girl's biological father. Petitioners have since acknowledged Father's paternity. Pet. App. 10a.

2. The Family Court held a four-day hearing to resolve custody of Baby Girl, at which a central question was whether to apply ICWA's child custody standards. Adoptive Couple contended that ICWA was unconstitutional and, in any event, should not apply in this case under the "existing Indian family doctrine," which posits that ICWA does not apply when an unmarried non-Indian mother surrenders custody of an Indian child who is not currently living with an Indian family. Pet. App, 109a-110a, 113a. But the Family Court rejected both of these contentions.

On the first, the court held that ICWA does not violate equal protection principles because disparate treatment "is 'granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.'" Pet. App. 116a (quoting *Morton* v. *Mancari*, 417 U.S. 535, 554 (1974)). As for the "existing Indian family doctrine," the court held that it has no bearing here for two independent reasons. The court initially held the doctrine wholly invalid, "follow[ing] the majority of other jurisdictions and the clear modern trend and not adopt[ing] the 'existing Indian family' doctrine as an exception

to the application of ICWA." *Id.* at 118a. And, the family court judge added,

> even if I found "EIF" to be good law, I find it inapplicable to the facts of this case. Specifically, I find [Father] is a Cherokee in more than name only, and there is, in fact an existing Indian family. There was ample testimony to support that [Father's] heritage and culture are very important to him and always had been * * *. [T]here was evidence in [the home of Father and his family] reflecting their pride and connection to the [Cherokee] Nation and the Wolf Clan. I find that [Father] has a strong cultural tie to the Cherokee Nation.

Id. at 118a-119a.

The court went on to hold that Father meets ICWA's definition of "parent" because "he has both acknowledged paternity and paternity has been conclusively established in this action through DNA testing." Pet. App. 121a. This meant that, under ICWA, Adoptive Couple "must prove grounds to terminate [Father's] parental [rights] and must prove that custody of the child by [Father] is likely to result in serious emotional or physical damage to the child." *Id.* at 122a-123a. But the court found that Adoptive Couple failed to prove either of those things. *Id.* at 126a. The court noted that Father "is the father of another daughter" and that "[t]he undisputed testimony is that he is a loving and devoted father. Even [Mother] herself testified that [Father] was a good father. There is no evidence to suggest that he would be anything other than an excellent parent to this child." *Id.* at 126a-127a. Accordingly, the court found that "the birth father is a fit and proper person to

have custody of his child"; he "has demonstrated that he has the ability to parent effectively" and "has convinced me of his unwavering love for this child." *Id.* at 127a-128a.

The court concluded that, "[w]hen parental rights and the best interests of the child are in conflict, the best interests of the child must prevail. However, in this case I find no conflict between the two." Pet. App. 128a. The court added that, although Adoptive Couple had Baby Girl in their care for two years, "[w]hen this child was but four months old, [Adoptive Couple] knew her natural father wanted custody of his daughter and he was contesting the adoption both in Oklahoma and in South Carolina. However, they elected to pursue adoption over his objection. Custody and parental rights cannot be gained by adverse possession." *Ibid.*

The court accordingly denied the adoption and required Adoptive Couple to transfer Baby Girl to Father. The transfer took place on December 31, 2011. Pet. App. 2a. As of this writing, Baby Girl has resided with Father and his parents in Oklahoma for almost a full year.[5]

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[5] A guardian ad litem ("GAL") was appointed to represent Baby Girl below; the GAL has filed a brief in this Court as respondent in support of the petition that purports to be on behalf of Baby Girl and asserts that Baby Girl's interests "would be served by allowing her adoptive parents to retain custody." GAL Br. 1. This submission is entitled to no weight. The GAL was selected by Adoptive Parents. Respondents initially sought removal of the GAL because they believed that the GAL was both biased in petitioners' favor and wholly unfamiliar with Indian culture. See Initial Brief of Respondent Cherokee Nation at 19-21, *Adoptive Couple* v. *Baby Girl*, No. 2009-DR-10-8303 (S.C. Feb. 15, 2012). Rather

3. On appeal Adoptive Couple changed their approach, expressly waiving reliance on the "existing Indian family doctrine" and disavowing their constitutional argument.[6] The South Carolina Supreme Court nevertheless affirmed. Pet. App. 1a-102a.

That court devoted the great bulk of its attention to the question whether Adoptive Couple "proved grounds to terminate Father's parental rights under the ICWA." *Id.* at 12a. On this, the court was closely divided. The majority held that "we cannot say that

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than delay the proceedings, however, they instead ultimately agreed with petitioners that the Family Court would *not* consider either the GAL's conclusion regarding Baby Girl's best interests or the GAL's custody recommendation. See Pet. App. 51a n.44 (Kittredge, J., dissenting). Indeed, South Carolina law *precludes* a guardian ad litem in a private adoption from providing a custody recommendation unless one is requested by the court (see S.C. Code Ann. § 63-3-830(A)(6)); no such request was made here.

We also note that, notwithstanding her filing in this Court, the GAL did not appeal the Family Court's decision below. Although the GAL nevertheless initially attempted to file a brief in the South Carolina Supreme Court, she then withdrew it—seemingly not "after deciding that Baby Girl would be better served if the South Carolina Supreme Court were only asked to address the arguments raised by petitioner in their appeal," as she now improbably asserts (GAL Br. 5 n.1), but in response to Father's motion to strike her brief as improper. See Motion By Birth Father To Strike Initial Brief Filed By Guardian Ad Litem Or In The Alternative To Permit Birth Father To File Brief In Response, *Adoptive Couple* v. *Baby Girl*, No. 2009-DR-10-8303 (S.C. Feb. 21, 2012).

[6] Petitioners did not argue either point in their briefs to the South Carolina Supreme Court. When pressed at oral argument, petitioners' counsel expressly disclaimed both. We do not reprint the exchange here because the transcript of that argument remains sealed.

Baby Girl's best interests are not served by the grant of custody to Father, as [petitioners] have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family" (*id.* at 37a); the court added that "even if we were to terminate Father's rights" (*ibid.*), Adoptive Couple failed to demonstrate good cause for departing from ICWA's statutory placement preferences. *Id.* at 38a-39a. The two dissenting justices vehemently disagreed, opining that "the unique facts of this case" should lead to placement of Baby Girl with Adoptive Couple. *Id.* at 42a (Kittredge, J., dissenting). Petitioners, however, do not raise that factual issue—the source of the disagreement below—before this Court.

In contrast, the justices below found the two questions that petitioners now present to this Court to be easy, and they unanimously rejected petitioners' arguments on those questions. In a footnote, the majority below took "this opportunity to reject the 'Existing Indian Family' doctrine," "[g]iven that its policy conflicts with the express purpose of the ICWA"; the court noted that "we join the majority of our sister states who have rejected the EIF or have since abandoned the exception." *Id.* at 17a-18a n.17. The dissenting justices agreed. *Id.* at 55a n.46 (Kittredge, J., dissenting).

By the same token, the majority rejected petitioners' argument that, because South Carolina law does not require Father's consent to the adoption, he does not qualify as a "parent" under ICWA. The court explained that this argument "collapse[s] the notions of paternity and consent," and that "Father met the ICWA's definition of 'parent' by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed

up for adoption and establishing his paternity through DNA testing." *Id.* at 22a. "[B]y its plain terms, this is all that is required under the ICWA." *Ibid.* The dissenters expressly agreed. *Id.* at 58a (Kittredge, J., dissenting). And both majority and dissent likewise agreed that Father's status as a "parent" under ICWA was largely beside the point: "ICWA applies because Baby Girl is an Indian child, and whether or not this Court finds Father a 'parent' has no bearing on ICWA's applicability." *Id.* at 20a-21a n.18; see *id.* at 59a (Kittredge, J., dissenting) ("[E]ven if Father had not acknowledged paternity here, ICWA nonetheless would apply simply because Baby Girl is an Indian child."). As a consequence, the issues now presented here by petitioners and their *amici* were a very small part of the dispute below, where those questions were regarded as noncontroversial and were easily resolved.

REASONS FOR DENYING THE PETITION

The petition for certiorari in this case makes a very peculiar presentation. Although the South Carolina Supreme Court was indeed closely divided, petitioners have chosen *not* to advance the issues on which the justices below disagreed. Instead, the petition presents for review two questions that the justices of the South Carolina Supreme Court unanimously, and correctly, regarded as insubstantial.

Petitioners' contentions should not get a more favorable reception here. The "existing Indian family doctrine" on which they rely has received an increasingly chilly reception from state courts and legislatures across the nation; there is no need for this Court to address an approach that is invoked infrequently and with diminishing success in the lower courts. Even if that were not so, petitioners *waived*

reliance on the doctrine below, leaving undeveloped factual points that bear on application of the doctrine and making this case an especially poor one in which to address it. As for the second purported conflict advanced by petitioners—whether state or federal law governs the determination of paternity under ICWA—it is not presented here at all: *every* court would apply the approach to that question taken by the South Carolina Supreme Court in this case.

Having said that, we of course recognize that the dispute here is a painful and wrenching one because it involves child custody. But it is not a dispute where this Court's intervention is appropriate. The petition for certiorari should be denied.

I. Petitioners' Question Regarding The "Existing Indian Family Doctrine," Which Was Waived Below, Does Not Warrant Review.

Petitioners' principal contention is that the Court should grant review to determine the validity of the "existing Indian family doctrine," maintaining that "[t]he division among state courts" on that question "has become more deeply entrenched in recent years" and that "[t]his case presents an ideal vehicle to resolve the conflict." Pet. 14. But these contentions are quite plainly wrong. In fact, this case is an especially poor vehicle for resolution of the question, and the conflict is in any event one of limited and diminishing importance. For these reasons—and because the decision below is correct—further review of the issue is not warranted.

A. Petitioners waived the "existing Indian family" argument.

At the outset, this case would be a notably bad one in which to address the "existing Indian family

doctrine." When pressed at oral argument before the South Carolina Supreme Court, counsel for petitioners explicitly *abandoned* reliance on the doctrine. Presumably as a consequence, the court below—although "tak[ing] this opportunity to reject" the doctrine (Pet. App. 17a n.17)—limited its analysis to a single footnote. *Ibid.* In three sentences, the court described the doctrine, observed that the majority of states have rejected or abandoned it, and refused to apply the doctrine on the ground that "its policy conflicts with the express purpose of the ICWA." *Ibid.* It is unclear whether the court actually regarded these brief comments as a holding; the dissenting justices opined that they likewise would have rejected the doctrine "[w]ere the issue before this Court." *Id.* at 55a n.46 (Kittredge, J., dissenting). This failure by petitioners to properly present the issue below is reason enough for the Court to deny review.

That is especially so because petitioners' waiver of the argument denied the South Carolina Supreme Court an opportunity to address the issue fully, and therefore would handicap this Court's consideration of the question were review granted. Thus, the Family Court found that the doctrine, even if good law, would be "inapplicable to the facts of this case" because "there is in fact an existing Indian family." Pet. App. 118a. There is good reason to believe that even those courts that accept the doctrine would agree: Those courts have applied the doctrine when the child "probably never would be" raised in an Indian environment absent application of ICWA (*In re the Adoption of Baby Boy L.*, 643 P.2d 168, 171 (Kan. 1982)), a conclusion that cannot be reached here given the close connection of Father and his family with the Cherokee Nation. Yet petitioners' waiver of the "existing Indian family doctrine" argument on appeal

means that this issue was not explored below. And that, too, counsels in favor of denying the petition.

B. The "existing Indian family" argument is of limited importance and does not warrant consideration by this Court.

1. Even if the issue had not been waived, it assuredly is not the case that the conflict on the "existing Indian family doctrine" in state court "has become more deeply entrenched in recent years." Pet. 14. In fact, the very substantial majority of state courts that have considered the doctrine have rejected it. Nineteen states firmly oppose application of the doctrine,[7] while only seven states employ it.[8] And the

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[7] In fourteen of these States, it is the courts that rejected the exception. *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *Michael J., Jr.* v. *Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re Baby Boy Doe*, 849 P.2d 925, 931 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832, 839 (Ill. App. Ct. 1993), rev'd on other grounds, 657 N.E.2d 935 (Ill. 1995); *In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 322-23 (N.Y. App. Div. 2005); *In re A.B.*, 663 N.W.2d 625, 635-36 (N.D. 2003); *Quinn* v. *Walters*, 845 P.2d 206, 209 (Or. Ct. App. 1993), rev'd on other grounds, 881 P.2d 795 (Or. 1994); *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *In Interest of D.A.C.*, 933 P.2d 993, 999-1000 (Utah Ct. App. 1997). In six additional states, legislatures rejected the doctrine. See Cal. Welf. & Inst. Code § 224(c); Iowa Code Ann. § 232B.5; Minn. Stat. Ann. § 260.771; Okla. Stat. Ann. tit. 10, § 40.1; Wash. Rev. Code Ann. § 13.34.040(3); Wis. Stat. Ann. § 938.028(3)(a).

[8] *S.A.* v. *E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *Rye* v. *Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton* v. *J.A.L.*, 658

movement is all in one direction: Although South Dakota, Oklahoma, Washington, and Kansas initially embraced the doctrine, each of those States now rejects it. By contrast, there is no jurisdiction that initially rejected the doctrine but later chose to adopt it.

These reversals reflect important developments in the doctrine's history, each of which has contributed to its decline. The first was this Court's decision in *Holyfield*, where the Court recognized ICWA's role in protecting the tribal interest in Indian children. After that decision, courts in twelve States rejected the doctrine, nearly all relying on *Holyfield*. See note 7, *supra*. In addition, legislatures in six states rejected the doctrine after *Holyfield*, in several cases setting aside prior judicial constructions. See *ibid.*

The final and most dramatic reversal came from the Kansas Supreme Court, which first judicially created the doctrine in 1982. In 2009, that court reversed its original decision and repudiated the doctrine. The court stressed that the later decision had been "influenced by our sister states' and commentators' widespread and well-reasoned criticism of the doctrine." *In re A.J.S.*, 204 P.3d 543, 550 (Kan. 2009), overruling *In re Adoption Baby Boy L.*, 643 P.2d. 168 (Kan. 1982). Following this decision, scholars have predicted that "the tide will continue to turn against the doctrine until eventually it is completely rejected." Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at*

So. 2d 331, 337 (La. Ct. App. 1995); *In Interest of S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255 (Nev. 2009); *In re Morgan*, 1997 WL 716880 (Tenn. Ct. App. 1997).

20, In the Matter of A.J.S., *and the Last Gasps of A Dying Doctrine*, 36 Wm. Mitchell L. Rev. 684, 690 (2010).

Against this background, the conflict plainly has weakened, as "the last dozen years * * * have seen a wholesale rejection of the 'existing Indian family doctrine.'" Lewerenz & McCoy, *supra*, at 690. Since 2000, five states have joined the consensus against the doctrine (Arizona, New York, North Dakota, Kansas, and Colorado), while only one new state (Nevada) has endorsed it.[9] Because the doctrine has been relegated "to little more than a troublesome footnote in a handful of states" (*ibid.*), this conflict would not merit the Court's review even were the issue properly presented here.

2. As this last point indicates, the evidence also suggests that the persistence of the "existing Indian family doctrine" in a small and diminishing number of jurisdictions is not a matter of significant concern—and certainly does not justify the Court reaching out to grant review in a case with as substantial a waiver problem as this one. Petitioners attempt to inflate the significance of the conflict with sweeping claims that the doctrine affects "thousands of adoption proceedings." Pet. 18. By all indications, however, the doctrine affects no more than a few litigants each year.

Although ICWA cases may be common, only a small fraction of these disputes involve the "existing

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[9] Indeed, the Nevada "case-by-case" approach demonstrates why even those courts that embrace the doctrine would not apply it here. *In re N.J.*, 221 P.3d at 848. There, the court employed it only because neither the Indian father nor the Tribe contested the adoption. Here, both do.

Indian family doctrine." A comprehensive search reveals that, in the last ten years, fewer than 2% of all ICWA decisions in the Westlaw database have even *mentioned* the doctrine.[10]

The absolute numbers are equally telling. The doctrine was raised in only 51 of the nearly 3,000 ICWA cases reported in Westlaw during the last decade. In the last three years, the Nation's state courts have reported to Westlaw just twelve cases involving the doctrine. Indeed, most jurisdictions have reported only one or two cases addressing the doctrine during the entire course of its thirty-year history. Eleven states (Arizona, Idaho, Illinois, Kentucky, Michigan, Montana, Nevada, New Jersey, North Dakota, Oregon, and South Carolina) report only one such case on Westlaw, while eight others (Alaska, Colorado, Indiana, Louisiana, Missouri, New York, Tennessee, and Utah) report two. In twenty-four states, the doctrine has never been addressed in a reported decision. Overall, courts have reported nearly 800 ICWA cases in the last three years, but have employed the doctrine in just two of those decisions. Plainly, this is not an issue calling out for this Court's attention.

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[10] These numbers were obtained by performing two searches—*"Indian Child Welfare Act"* and *"Indian Child Welfare Act" & "existing Indian"*—for each of the years from 2000 to 2012. We note that most state family court decisions are not reported on Westlaw and decisions in such cases accordingly are reflected in these numbers only if appeals were taken.

C. The South Carolina Supreme Court was correct in unanimously rejecting the "existing Indian family doctrine."

The limited need for review is particularly apparent because the South Carolina Supreme Court's rejection of the "existing Indian family doctrine" is correct.

As an initial matter, "the plain meaning of the legislation should be conclusive." *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 242 (1989). And under the plain text, only two requirements must be met for ICWA to apply: the child involved must be an "Indian child"; and the child must be the subject of a "child custody proceeding"—that is, an action involving termination of parental rights, foster care, or preadoptive or adoptive placement. 25 U.S.C. § 1903(1). There is nothing in the law's text to suggest that ICWA does not apply when both of these requirements are satisfied.

In nevertheless defending the doctrine, petitioners point to a single legislative clause, in 25 U.S.C. § 1912(f), which states that parental rights may not be terminated without a finding "that the *continued custody* of the child by the parent * * * is likely to result in serious emotional or physical damage to the child." (Emphasis added). Petitioners maintain that this language precludes the law's application "when the parent at issue lacks prior custody of the child." Pet. 25. But their argument fails, for two reasons.

First, as the statutory text suggests, this provision has the limited purpose of "establish[ing] evidentiary standards" for use in child custody proceedings. H.R. Rep. No. 95-1386, at 22 (1978). See also S. Rep. No. 95-597, at 16 (1978) ("[t]he intent of [the

parental termination provision] is to establish standards and guidelines" in the placement of Indian children). Petitioners overlook the most likely explanation for Congress's use of the term "continued custody" in this context—that most parental-rights termination hearings involve parents who have custody of the child.

Additionally, petitioners' interpretation would lead to absurd results. If the meaning of "continued custody" were limited to physical custody, Section 1912(f) would arbitrarily "preclude application of the Act to an entire class of fathers who were unable, due to circumstances beyond their control, such as imprisonment, military service, or the mother leaving the jurisdiction, to assume actual physical custody of their children." *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 937-938 (N.J. 1988). Had Congress intended to limit ICWA in this way, it surely would have done so explicitly and not by indirection in a collateral statutory provision. *Cf. Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991) ("if Congress had such an intent, Congress would have made it explicit in the statute"). "Congress * * * does not alter the fundamental details of a regulatory scheme in * * * ancillary provisions—it does not * * * hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001).[11]

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[11] Moreover, petitioners ignore the likelihood that in this context "custody" refers to legal—not physical—custody. ICWA defines an "Indian custodian" as "any Indian person who has legal custody of an Indian child" or "to whom temporary physical care, custody, and control has been transferred by the parent of such child." 25 U.S.C. § 1903(6). Pointing to this provision, several courts have held that § 1912(f) "must encompass more than simply actual physi-

Second, the "existing Indian family doctrine" does violence to more than the statutory text; it also frustrates one of ICWA's core purposes. The statute was enacted "to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children * * *. " 25 U.S.C. § 1902. That interest is directly harmed by the doctrine: In a case like this one, the doctrine would lead to removal of an Indian child from an Indian family that wants to raise the child in a tribal environment. That plainly runs counter to the "[f]ederal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37.

The Court gave force to this policy in *Holyfield*, where it held that the biological parents of two Indian children could not avoid tribal jurisdiction under ICWA by acting to have their children born outside the reservation. 490 U.S. at 49. As the Court explained, ICWA's provisions should not "be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Ibid.* The Court stressed that "[t]he numerous prerogatives accorded the tribes through the ICWA's substantive provisions * * * must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of

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cal custody." *In re Crystal K.*, 276 Cal. Rptr. 619, 626 (Ct. App. 1990); accord *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 937 (N.J. 1988); *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *In Interest of D.A.C.*, 933 P.2d 993, 1002 (Utah Ct. App. 1997).

the tribes themselves." *Ibid.* And just as the parents in *Holyfield* could not preclude ICWA's application, Mother in this case may not frustrate ICWA by unilaterally deciding that her child will not be raised in an Indian home.

D. The "existing Indian family doctrine" is not necessary to preserve the constitutionality of ICWA.

In addition, petitioners disregard their waiver below and, supported by the guardian ad litem, suggest that application of the "existing Indian family doctrine" is essential to the constitutionality of ICWA. Pet. 26. Although this argument is in some respects obscure, we understand petitioners and the guardian to contend that ICWA is constitutionally defensible only "when the Indian child's 'relationship to the tribe' is based on something more than race," as when there are "'substantial social, cultural or political affiliations between the child's family and a tribal community.'" GAL Br. 15, 17 (citation omitted). But in the area of Indian affairs, the Court has consistently acknowledged that special treatment of Indians is justified "[a]s long as the [treatment] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). That is what Congress did in ICWA, determining "that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). The promulgation of standards to address the massive separation of Indian children from their tribal communities therefore is exactly what this Court contemplated when it held that "Congress may fulfill its treaty obligations and its responsibilities to the In-

dian tribes by enacting legislation dedicated to their circumstances and needs." *Rice* v. *Cayetano*, 528 U.S. 495, 519 (2000).

Regardless whether Baby Girl was "disconnected from the Tribe and her Indian relatives" at the time of birth (GAL Br. 14-15), the issue of her custody concerns tribal sovereignty directly, for her placement will either contribute to or detract from the "continued existence and integrity of Indian tribes." 25 U.S.C. § 1901(3). The Parental Termination provision helps prevent unwarranted removal of Indian children. Especially when combined with the statutory preference for intra-tribal placement, the Parental Termination provision serves ICWA's broader purpose that, "where possible, an Indian child [should remain] in the Indian community." *Holyfield*, 490 U.S. at 37. The "clear connection between the child and tribal sovereignty" demanded by the guardian (GAL Br. 14) is therefore fully present in this case.

In any event, even if there could be something to Petitioners' and guardian's constitutional contentions, the affiliations they demand are precisely what the Family Court in this case found Father and his family *to have* with the Cherokee Nation (see 8-9, *supra*)—and the existence of such relationships hardly turns on physical custody of Baby Girl by an Indian caregiver at the time Mother surrendered the child for adoption. As we have noted, petitioners forfeited their right to challenge that factual determination by waiving their "existing Indian family doctrine" and constitutional arguments on appeal below.

II. This Case Does Not Implicate Any Conflict Over ICWA's Definition Of "Parent" As Applied To Unwed Fathers.

Petitioners also are incorrect in their separate argument that review is appropriate to settle the meaning of the word "parent" as it is used in ICWA. The statute defines "parent" to mean "any biological parent or parents of an Indian child"; it excepts "the unwed father where paternity has not been acknowledged or established," but does not specify *how* an unwed father may acknowledge or establish paternity. 25 U.S.C. § 1903(9). Here, the South Carolina Supreme Court concluded that Father satisfied the statutory definition of parent by both (1) "acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption" and (2) "establishing his paternity through DNA testing." Pet. App. 22a. See also *id.* at 58a (Kittredge, J., dissenting) (same). This sensible determination accords with the approach taken by *every* state court to address the issue. But even if that were not so, ICWA's ultimate applicability in this case turns not on Father's status as a "parent," but on Baby Girl's undisputed status as an "Indian child." Review by this court accordingly is unwarranted.

A. ICWA's definition of "parent" for unwed fathers does not look to state adoption law.

Petitioners suggest that there is a conflict among state courts over the meaning of Section 1903(9)'s requirement that an unwed father acknowledge or establish paternity. They maintain that courts in five states have held that "a putative father's parental status under ICWA is contingent upon compliance

with state paternity laws," while the court below joined two other state courts in holding "that ICWA's definition of 'parent' does not require compliance with state laws for establishing or acknowledging paternity." Pet. 15, 16. In fact, whether there is *any* disagreement on this point is questionable; most courts have given the subject only minimal analysis, and not one has suggested a division of authority. *Cf. Bruce L.* v. *W.E.*, 247 P.3d 966, 979 (Alaska 2011) (canvassing California, New Jersey, South Dakota, Texas, and Arizona cases and concluding they all indicate that "to qualify as an ICWA parent an unwed father * * * [need only have] made reasonable efforts to acknowledge paternity").

Even assuming that the conflict hypothesized by petitioners exists, however, it is not presented by this case. *Every* state court of last resort that has looked to state law in applying Section 1903(9) has invoked state procedures for acknowledging and establishing paternity. See *Bruce L.*, 247 P.3d at 979 (looking to the "Alaska legitimation statute"); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 934 (N.J. 1988) (New Jersey Parentage Act); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 n.18 (Okla. 1985).[12] See also, *e.g.*, *Jared P.* v. *Glade T.*, 209 P.3d 157, 161 (Ariz. Ct. App. 2009) (state procedures for petitioning for paternity); *In re Daniel M.*, 1 Cal. Rptr. 3d 897 (Ct. App. 2003) (state procedures for voluntary declaration of paternity or blood testing).

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[12] The *Baby Boy D* court cited two provisions of state law: 10 O.S. 1981 § 55; *id.* § 60.3(4) (making an unmarried father eligible to adopt a child).

And that is just what the courts below did in this case. South Carolina's paternity law provides that a court "may order * * * the putative father * * * to submit to genetic tests * * * which have been developed for the purpose of proving or disproving parentage." S.C. Code Ann. § 63-17-30(A). These tests create a rebuttable presumption in favor of the putative father's paternity if they show a statistical probability of paternity greater than ninety-five percent. *Id.* § 63-17-60(A)(3). It was pursuant to this law that the Family Court ordered Father to take a paternity test, and that test conclusively established that he is Baby Girl's biological father. This finding—as well as the fact that Father acknowledged biological paternity since before Baby Girl's birth—established Father's paternity *under South Carolina law*. Even applying state law to ICWA's definition of "parent," then, Father has satisfied the statutory criteria. In such circumstances, this case presents no opportunity for the Court to address the conflict posited by petitioners.

Petitioners' contrary argument rests on a basic misunderstanding of state law. Rather than look to South Carolina law on *paternity*, they argue that the correct referent in Section 1903(9) is state *adoption* law. This law, they claim, "in effect defines parenthood by specifying the circumstances in which an unwed biological father's consent is required to proceed with an adoption that takes place within six months of the child's birth." Pet. 23 (citing S.C. Code Ann. § 63-9-310(A)(5)).

As all of the justices below observed, however, this contention "collapse[s] the notions of paternity and consent." Pet. App. 22a. See also *id.* at 58a (Kittridge, J., dissenting) ("The issues of paternity and

whether one's consent is required in an adoption proceeding are separate questions."). There is no need to define paternity "in effect" by looking to South Carolina adoption law; South Carolina law expressly and *directly* defines the procedures for acknowledging or establishing paternity. See S.C. Code § 63-17-10(A) ("The purpose of this article is to establish a procedure to aid in the determination of the paternity of an individual."). Father satisfied the test established by those procedures.[13]

No court has ever held that an unwed father's status as a "parent" for purposes of ICWA depends on his state law right to consent to an adoption. And rightly so, as that reading would defeat a central purpose of the statute. ICWA itself grants parents important consent rights in the adoption context. See 25 U.S.C. § 1912(f) (requiring parental consent to adoption absent proof beyond a reasonable doubt that continued custody is likely to result in serious damage to the child); *id.* § 1913(c) (giving a parent the right to withdraw consent to an adoptive placement of an Indian child "for any reason at any time prior to the entry of a final decree"). It makes no sense to condition the availability of these enhanced federal consent rights on the existence of state consent rights; Congress enacted ICWA to give Indian parents *more* protection than was available under state law, not less. See *Holyfield*, 490 U.S. at 44-45.

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[13] The Uniform Parentage Act, cited by petitioners (Pet. 22-23), contains no provision addressing when an unwed father must consent to adoption. See Uniform Parentage Act (2002), *available at* http://tiny.cc/z2sgow.

B. This case is a poor vehicle to resolve the question.

In any event, as all of the justices below also noted, Father's status as an ICWA "parent" is largely beside the point for present purposes: Here, application of ICWA turns not on Father's status as a "parent" but on Baby Girl's uncontested status as an "Indian child." See Pet. App. 21a n.18 ("[T]he ICWA applies because Baby Girl is an Indian child, and whether or not this Court finds Father a 'parent' has no bearing on the ICWA's applicability."); *id.* at 59a (Kittredge, J., dissenting) ("[E]ven if Father had not acknowledged paternity here, ICWA nonetheless would apply simply because Baby Girl is an Indian child."). ICWA gives the Cherokee Nation an independent right to intervene in "any State court proceeding for * * * termination of parental rights to[] an Indian child." 25 U.S.C. § 1911(c). And as an intervenor, the Cherokee Nation has standing to invoke 25 U.S.C. § 1915(a), which sets out placement preferences for the adoption of Baby Girl. See, *e.g.*, *In re T.S.W.*, 276 P.3d 133, 143 (Kan. 2012). This Court has called that provision the "most important substantive requirement imposed on state courts" by ICWA. *Holyfield*, 490 U.S. at 36. Absent good cause to the contrary, Section 1915(a) requires that Baby Girl be placed with a member of her extended family or another member of her Tribe.

In this case, the South Carolina Supreme Court expressly found that placement of Baby Girl with her family was presumptively in her best interests, and therefore concluded that petitioners failed to demonstrate good cause to deviate from the statutory placement preference established by Section 1915(a). Pet. App. 37a-39a. Petitioners have not asked this

Court to review that good-cause determination. Accordingly, resolution of the question they do present would not affect the outcome here—which, again, makes this case a uniquely bad one in which to address petitioners' contention regarding the meaning of ICWA.

C. ICWA's definition of "parent" does not mandate compliance with state definitions of paternity for unwed fathers.

Finally, petitioners' argument that 25 U.S.C. § 1903(9) requires unwed fathers to comply with the state definition of "parent" is wrong on the merits. ICWA's text, purpose, and structure require only that, to establish parenthood, the unwed father take reasonable steps to acknowledge or establish paternity before an adoption is finalized—as Father undeniably did here.

The Court's interpretation of ICWA begins "where all such inquiries must begin: with the language of the statute itself." *Ransom* v. *FIA Card Servs., N.A.*, 131 S. Ct. 716, 723 (2011). That language deems an unwed father to be a "parent" when paternity has been "acknowledged or established." 25 U.S.C. § 1903(9). These words have an ordinary meaning: it is enough for the father to affirm paternity or take reasonable steps to establish paternity as a factual matter. See *Bruce L.*, 247 P.3d at 979.

That is especially so because the Court "start[s] * * * with the general assumption that in the absence of a plain indication to the contrary, * * * Congress when it enact[ed ICWA was] not making the application of the federal act dependent on state law." *Holyfield*, 490 U.S. at 43 (citation omitted). "Where Congress did intend that ICWA terms be defined by ref-

erence to other than federal law, it stated this explicitly." *Id.* at 47 n.22. See, *e.g.*, 25 U.S.C. § 1903(6) (defining "Indian custodian" to mean "any Indian person who has legal custody of an Indian child under tribal law or custom or *under State law*") (emphasis added). Yet it did not do so in Section 1903(9).

Against this backdrop, petitioners rely on a snippet from the legislative history—"the definition of 'parent' in ICWA 'is not meant to conflict with the decision of the Supreme Court in *Stanley* [v. *Illinois*, 405 U.S. 645 (1972)]"—which they read to mean that Congress in ICWA "intended that parenthood for unwed fathers would be limited to those who showed the requisite support under state law." Pet. 22 (quoting H.R. Rep. No. 95-1386, at 21 (1978)). As a due process case, however, *Stanley* applies with equal force to federal *and* state procedures for acknowledging or establishing paternity.[14] ICWA's legislative history is just as consistent with a congressional intent to define paternity with reference to *federal* law as it is with an intent to define it with reference to *state* law; in both cases, the applicable procedures must meet constitutional standards. This fragment of legislative history therefore sheds no light at all on the question presented by petitioners. Certainly, it does not rebut the "likelihood that, had Congress intended a state-law definition, * * * it would have said so." *Holyfield*, 490 U.S. at 47 n.22.

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[14] *Stanley* involved a due process challenge to an Illinois statute that declared the children of unwed fathers wards of the State upon the death of the mother, without any opportunity for the father to show parental fitness. The Court concluded that Illinois had to give the father a hearing before it removed his children from his custody. 405 U.S. at 658.

* * *

There is no denying that the circumstances of this case have been painful and personally difficult for all of the parties. But that hardly means, as petitioners hyperbolically contend, that the legal issues here "potentially impact thousands of child custody cases *annually*," that "[t]he decision below sends a chilling message to any couple wishing to adopt a child of Native American descent," or that legal uncertainty in this area "spawns litigation that permanently and tragically disrupts established family units." Pet. 3, 10. To the contrary, as the dissenting justices below themselves recognized, the dispute here turned on "the unique facts of this case" and the conclusions drawn from those facts upon review of "the voluminous record." Pet. App. 42a, 43a (Kittredge, J., dissenting).

In fact, the real disruption here stems from the extraordinary defects in the adoption process that are attributable to Mother and petitioners. As both courts below noted, had Father's Cherokee heritage been candidly disclosed prior to the adoption, Baby Girl would never have been allowed to leave Oklahoma in the first place. Had the commencement of the adoption proceedings been disclosed to Father in a timely fashion—and not four months after the fact, by a process server, as Father was en route to his deployment in Iraq—Father would have contested it at the outset. And even so, as the Family Court explained, "[w]hen the child was but four months old, [Adoptive Couple] knew her natural father wanted custody of his daughter and he was contesting the adoption both in Oklahoma and in South Carolina. However, they elected to pursue adoption over his objection. Custody and parental rights cannot be

gained by adverse possession." Pet. App. 128a. Baby Girl, now three years old, has been living with Father and her family in Oklahoma for almost a year. This Court should deny review and bring this litigation to an end.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Petition for a Writ of Certiorari to the South Carolina Supreme Court

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REPLY BRIEF

Over half of the states are sharply divided regarding ICWA's application where a non-Indian parent with sole legal custody of a child voluntarily places the child for adoption. Application of *state* law below would have resulted in the adoption of Baby Girl by petitioners. This case affects deeply personal and sovereign choices about parenthood. Because ICWA cases arise in state courts, only this Court can definitively interpret ICWA. *See Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. ___ (2012) (per curiam), slip op. at 1. Respondents do not dispute these points.

Respondents instead speculate that one conflict may resolve itself and manufacture non-existent vehicle issues. They also try to distract the Court's attention from the important legal questions presented by attempting to lay blame for this tragedy on everyone except Father, not once acknowledging that he abandoned his unborn daughter and forfeited all parental rights under state law. But we are not asking the Court to lay blame on anyone. This case presents a clean vehicle to resolve two questions at the heart of a federal law that affects fundamental rights of countless individuals in similar custody disputes involving children of Native American descent. The petition asks this Court to decide those vitally important federal issues over which state courts are hopelessly and undeniably split.

ICWA's application below dramatically displaced South Carolina's parentage and custody laws. Father's consent to Baby Girl's adoption is unnecessary because he voluntarily abandoned Mother and Baby Girl emotionally and financially, forfeiting his parental rights. Respondents have it exactly backwards accusing petitioners of adopting Baby Girl by

"adverse possession" (Opp. 10, 33). State law confers on Mother the unilateral right to place her baby with an adoptive home. Pet. 23. ICWA preempted state law *solely* because of race. Had this case arisen in other states, however, ICWA would not have ripped Baby Girl from petitioners. "This case presents these important federal questions as cleanly and dramatically as any case will." GAL Br. 19.

I. THE DIVISION OVER THE EXISTING INDIAN FAMILY DOCTRINE WARRANTS REVIEW

Respondents acknowledge the crisp division among state courts over the application of the existing Indian family doctrine. Opp. 16. At least 37 published decisions in 27 states involving *two-thirds* of the nation's American Indian population have acknowledged the conflict. Pet. 13. State courts and scholars have pleaded for this Court to clarify the application of ICWA in cases like this one. *Id.* 10, 14. Absent this Court's review, the vicissitudes of the split will determine families' destinies depending upon where they live.

1. Respondents are wrong that the conflict might go away. Opp. 1. Before this case, the most recent state supreme court to weigh in *adopted* the doctrine. *In re N.J.*, 221 P.3d 1255 (Nev. 2009). Indiana and Tennessee likewise recently reaffirmed the doctrine. *In re Adoption of D.C.*, 928 N.E.2d 602 (Ind. Ct. App. 2010); *In re K.L.D.R.*, No. M2008-00897-COA-R3PT, 2009 WL 1138130 (Tenn. Ct. App. Apr. 27, 2009). In the past two decades, only one state appellate court has reversed course and rejected the existing Indian family doctrine. *In re A.J.S.*, 204 P.3d 543 (Kan. 2009). Only one state statute overturning the doc-

trine was enacted in the last five years (Opp. 16 n.7), and each state statute *preceded* Nevada's recent embrace of the doctrine. Respondents heavily quote from one law review article predicting the doctrine's future decline. *Id.* 17-18. But those "scholars" (*id.* 17) are a law student and an Indian law attorney who tout their Native American affiliations in their author biographies. Preeminent adoption expert Professor Joan Hollinger advises that "courts remain sharply divided on this issue, and will continue to struggle with the question until it is definitively resolved by this Court." Hollinger *Amici* Br. 12.

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989), cited by respondents (Opp. 17), is the extreme opposite of this case. *Holyfield* held that an Indian child's domicile for tribal jurisdiction under Section 1911(a) was not defeated by the parents' temporary removal of the child at birth from the reservation. Here, Father's abandonment severed any possible Tribal connection with Baby Girl. Thus, courts repeatedly have held that *Holyfield* addresses *preserving* tribal connections and fully comports with the existing Indian family doctrine. *E.g.*, *Rye v. Weasel*, 934 S.W.2d 257, 262-63 (Ky. 1996) (collecting cases); *Crystal R. v. Superior Ct.*, 69 Cal. Rptr. 2d 414, 426 (Cal. Ct. App. 1997) (same). Seven states have applied the doctrine after *Holyfield*. Pet. 12. The entrenched conflict will not magically disappear.

2. There are no impediments to certiorari. The decision below definitively held: "[W]e take this opportunity to reject the 'Existing Indian Family' doctrine"; "In so holding, we join the majority of our sister states." Pet. App. 17a-18a n.17. This Court reviews an issue not pressed below "so long as it has been passed upon." *United States v. Williams*, 504

U.S. 36, 41 (1992). "It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991).

It rings hollow for respondents to oppose certiorari on waiver grounds after *respondents* extensively pressed the state supreme court to address the existing Indian family doctrine, expressly recognizing that the doctrine was outcome determinative. Cherokee Nation Br. 11-17 (S.C.); *id.* 17 ("Cherokee Nation has a real and vital interest in Baby Girl that can *only* be protected if this Court correctly chooses to not adopt the 'existing Indian family' doctrine . . . . Therefore, this Court *should affirm* the Family Court's decision to reject the antiquated 'existing Indian family' doctrine.") (emphases added); Birth Father Br. 39 (S.C.) (adopting Tribe's arguments). And petitioners argued that ICWA's "stated policy is to avoid breaking up Indian Families by removing children from their homes . . . . This policy is inapplicable here in that there was no family to break up." Appellants' Opening Br. 21 (S.C.).

3. No further factual inquiry is needed. Respondents acknowledge that the doctrine precludes ICWA's application when the child would not be raised in an Indian environment "absent application of ICWA." Opp. 15; *accord id.* 18 n.9; *In re N.J.*, 221 P.3d at 1264 (doctrine applies when "there is no existing Native American family, meaning the child is not, and never was, part of a Native American family or tribe"). That is this case: Baby Girl's non-Indian mother voluntarily placed her for adoption after Father abandoned them both, thereby severing any possible tribal connection to Baby Girl. Pet. App. 4a.

The Family Court erred in stating in dicta that there was an existing Indian family based on *Father's* connection to his Tribe. Opp. 15; Pet. App. 118a. The existing Indian family doctrine is determined *status quo ante* with respect to the *child*—in respondents' words, whether the child would be raised by an Indian family "absent application of ICWA." Opp. 15; Pet. 24-26. Again, respondents present the issue backwards by asserting that petitioners seek removal of an Indian child from an Indian family. Opp. 22-23. *Every* state embracing the doctrine would not apply ICWA here because Father's conduct prevented the formation of an Indian family. Pet. 14.

Respondents also misleadingly suggest this case turns on "unique facts." Opp. 32. It does not. The questions presented turn on the undisputed points that under state law Father abandoned his child and has no parental rights, making his consent to the adoption unnecessary. The dissent uttered the word "unique" only to express that Father's actions were so "unique[ly]" deplorable that his rights should have been terminated *even under ICWA*. Pet. App. 42a.[1]

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[1] Petitioners pause to correct other misstatements. The petition draws overwhelmingly from the majority, not the dissent (Opp. 4). As to Father's supposed attempts to reconcile with Mother during her pregnancy (Opp. 5-6), the majority stated that "Father did not make any meaningful attempts to contact her," Pet. App. 4a, and "Father was aware of Mother's expected due date, but made no attempt to contact or support Mother directly in the months following Baby Girl's birth," *id.* 8a. Petitioners never "conceal[ed]" (Opp. 6) Baby Girl's ethnicity. Mother's attorney contacted the Tribe to determine Father's Cherokee status. Pet. App. 6a. *Father* filed documents stating that neither he nor Baby Girl was Indian. *Id.* 9a. Mother *accurately* reported Baby Girl's ethnicity as "Hispanic" on the birth form. Opp. 7. Baby Girl is 1/2 Hispanic and 1/16 Chero-

II. THE UNSETTLED MEANING OF "PARENT" WARRANTS REVIEW

States are squarely divided over whether Section 1903(9) requires unwed fathers to comply with state paternity laws to invoke parental rights under ICWA. Pet. 15. *Compare Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. Ct. App. 1995) ("Congress intended to have the issue of acknowledgment or establishment of paternity determined by state law."), *with Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) (applying ICWA "even though Bruce did not comply with the Alaska legitimation statute"). The state supreme court did not apply state law to determine whether Father had parental rights, instead reading ICWA to create rights that had been forfeited under state law. Pet. App. 21a-22a.

Respondents stake out positions on *both sides* of the split. At one point they assert that "[*e*]*very* state court of last resort . . . has invoked state procedures for acknowledging and establishing paternity." Opp. 26. That is incorrect. Pet. 16-17. Four pages later, respondents abruptly reverse course, arguing "ICWA's definition of 'parent' does *not* mandate compliance with state definitions of paternity for unwed fathers." Opp. 30 (emphasis added). Respondents cannot have it both ways.

Again, the split is cleanly presented. The state supreme court rejected petitioners' argument that "ICWA defers to state law" on the steps an unwed father must undertake to have parental rights. Pet. App. 21a-22a; *id.* 12a (court's second question pre-

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kee. Respondents' insistence that Baby Girl is *only* Cherokee highlights their singular focus on bloodline.

sented). The court recognized that ICWA's displacement of state law was dispositive, explaining that "[u]nder state law, Father's consent to the adoption would not have been required." *Id.* 21a-22a n.19. In other words, absent ICWA, state law would have terminated his parental rights without further inquiry. *Id.* 58a (Kittredge, J., dissenting). The court deemed state law irrelevant because it construed ICWA to require only a biological link to the child. *Id.* 21a-22a. Compliance with the state DNA statute that respondents trumpet (Opp. 27) merely confirms that Father is the biological father, a point not disputed. But Congress did not create parental and custodial rights that unwed biological fathers do not have under state law. Pet. 22.

Respondents assert that petitioners failed to address ICWA's adoptive placement provision, 25 U.S.C. § 1915(a), which in respondents' view would block the adoption. Opp. 29-30. But no party other than Father and petitioners sought custody of Baby Girl, making Section 1915(a) irrelevant. Pet. 15 n.2. In short, if Father is not a parent under Section 1903(9), he may not invoke Section 1912(f), and state law controls. Pet. 21-24.

III. THE DECISION BELOW IS WRONG

Review is warranted independent of the merits of the decision below, given the split and the important and recurring nature of the questions presented. But in any event, the decision below is wrong. ICWA does not apply here. If it did, the law would be unconstitutional.

1. Respondents assert that "ICWA's ultimate applicability" turns "on Baby Girl's undisputed status as an 'Indian child.'" Opp. 25, 29. But the adoption

was blocked by ICWA's *parental* termination provision, 25 U.S.C. § 1912(f). Pet. 15 n.2. Father's ability to invoke *that* provision turns entirely on his parental status under Section 1903(9). "[E]ven if Baby [Girl] is an Indian child, [Father's] challenge under the Act fails" because he is not a "parent" under ICWA. *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 935-36 (N.J. 1988). Likewise, regardless of Baby Girl's status, under the existing Indian family doctrine, Father may not invoke Section 1912(f) because that provision requires a break of "*continued* custody." Pet. 25.

Respondents observe that limiting Section 1912(f) to cases where parents had "physical custody" would exclude unwed fathers who are parents under state law but lack physical custody. Opp. 21 & n.11. We agree that "custody" refers to legal custody under state law. But that observation hardly helps Father. He has no claim to physical *or* legal custody; state law gave Mother sole custody by default. S.C. Code § 63-17-20(B).

2. Principles of constitutional avoidance require reversal. Pet. 26. Father's conduct severed any connection that might otherwise have existed between Baby Girl and tribal interests. In granting Father custody over Baby Girl long after her adoptive placement, the court below applied ICWA based on race and race alone. That application of ICWA violates fundamental guarantees of equal protection and due process. And contrary to respondents' suggestion (Opp. 24), an argument in favor of statutory interpretation cannot be waived.

Properly applied, ICWA ensures that "where possible," an Indian child should not be "involuntarily separated" from an Indian community. *Holyfield*,

490 U.S. at 34, 37. Application here far exceeds any legitimate safeguarding of *existing* tribal relationships and unconstitutionally elevates race as dispositive in adoption proceedings. The decision below perniciously allowed race to trump a child's best interests and the fundamental rights of Mother and petitioners. And the decision offends Tenth Amendment principles by leaving states powerless to protect their most vulnerable citizens.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING

Thousands of Indian children are born to unwed, mixed-race parents annually, and that rate is increasing. Pet. 18-19. The decision below sends a chilling message to those who might wish to adopt a child with Native American ancestry. Petitioners, after seven failed attempts at in-vitro fertilization, relied on Father's forfeiture of parental rights under state law, only to learn long after the adoptive placement that race alone triggered application of ICWA. If that is the correct interpretation of federal law, then would-be adoptive parents are entitled to a clear pronouncement from this Court that applies even-handedly across all fifty states. Moreover:

- Because ICWA trumps the "best-interest-of-the-child" test in all adoption proceedings involving an Indian child, this case "implicates both respondent Baby Girl's most fundamental rights and constitutional concerns of the highest order." GAL Br. 7.[2]

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[2] The Family Court, not petitioners, appointed the Guardian *Ad Litem* to represent Baby Girl's interests. S.C. Code § 63-3-810 & 830; *id.* § 63-11-530(C). Because Baby Girl was a party

- Baby Girl's birth mother explains that, absent a decision from this Court, "birth mothers will continue to face intolerable uncertainty when making one of the most personal and important decisions in their lives." Birth Mother *Amica* Br. 7.

- The California State Association of Counties and the County Welfare Directors Association of California explain that their "responsibility for protecting juvenile dependent children with Indian ancestry has become increasingly challenging . . . and unnecessarily difficult due to confusion created by conflicting judicial interpretations of the ICWA requirements." CSAC *Amici* Br. 3. California represents our Nation's largest Indian population. *Id.*

- Adoption expert Joan Hollinger, the Center for Adoption Policy, the National Association of Counsel for Children, and Advokids concur that the current legal uncertainty "makes prospective parents less likely to pursue adoption" of Indian children. Hollinger *Amici* Br. 19.

- The American Academy of Adoption Attorneys stresses that the decision below enables men to "refuse to assume legal or financial responsibility for a fetus or child" while still invoking ICWA "to manipulate the mother['s] adoption decision." AAAA *Amicus* Br. 2, 11.

- The National Council for Adoption states that the split of authority allows "unstable and

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below, her guardian is a party in this Court. Sup. Ct. R. 12.6; *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

> unpredictable" outcomes that jeopardize "a child's right to a permanent, loving family [that] provides developmentally necessary healthy attachment through consistent caretakers." NCFA *Amicus* Br. 2-3.

Respondents weakly offer that "decisions in the Westlaw database" suggest that this case is unworthy of the Court's attention. Opp. 19. But (as respondents ultimately concede) Westlaw captures a miniscule fraction of family law orders, which are usually under seal and almost never published. And parties are exceedingly unlikely to appeal family court decisions where the law is firmly established. Westlaw also does not report the uncertainties that local governments, adoption agencies, and lawyers face in applying ICWA in the recurring fact pattern of this case. Likewise, Westlaw does not report a mother's decision whether to terminate her pregnancy, a couple's decision whether to adopt an Indian child, or ICWA's enduring impact on the lives of Indian children.

* * *

We respectfully submit that it is not necessary to invite the views of the United States. Respondents, including Baby Girl, are represented by able and experienced Supreme Court counsel, and the government may file at the merits stage. Time is of the essence for Baby Girl, not to mention all children and families who are impacted by the decision below. If certiorari is granted now, the case may be argued and decided this Term. But if the Court calls for the Solicitor General's views and ultimately grants certiorari, an additional year may pass before the case is decided. It is impossible to overstate the importance of that year in the life of Baby Girl, and the families

involved, if this Court concludes that the decision below is wrong.

Regardless of the government's views, certiorari is clearly warranted. Only this Court can resolve the conflicting interpretations of ICWA. Baby Girl and countless children similarly uprooted by ICWA's misapplication deserve resolution sooner rather than later. This Court's review will spare families and courts the costs and heartache of litigating hundreds, if not thousands, of custody proceedings. And a definitive pronouncement will promote voluntary adoptions of abandoned Native American children.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ADOPTIVE COUPLE

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION

Respondents.

On Petition for a Writ of Certiorari to the South Carolina Supreme Court

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INTEREST OF THE *AMICUS CURIAE*

The American Academy of Adoption Attorneys (Academy) is a not-for-profit organization of attorneys, judges and law professors throughout the United States and Canada, who have distinguished themselves in the field of adoption law and who are dedicated to the highest standards of practice.[1] The more than three hundred members of the Academy are versed in the complexities of adoption law. The Academy's mission is to support the rights of children to live in safe, permanent homes with loving families, to protect the interests of all parties to adoptions, and to assist in the orderly and legal process of adoption. The Academy's work includes promoting the reform of adoption laws and disseminating information on ethical adoption practices. The Academy regularly conducts seminars on the Indian Child Welfare Act (ICWA) and the rights of birth parents for attorneys and the judiciary. The Academy has been or is actively involved in legislative efforts both to amend the ICWA and to establish federal protections for putative birth parents.

The Academy is also actively involved in legislative efforts at the state level regarding state Indian Child Welfare legislation, e.g. Washington, South Dakota, California and Wisconsin, and in legislation provid-

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* and their counsel made such monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondents received timely notice of *amicus*' intent to file this brief and all parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

ing protections for birth parents in putative father registry statutes in states too numerous to list including Indiana, Missouri, South Carolina, Illinois, etc. Finally, the Academy actively supported and lobbied for the passage by the U.S. Congress of Public Law 110-351, Fostering Connections to Success and Increasing Adoption Act of 2008, which in pertinent part, authorizes Indian tribes to qualify for adoption subsidies to assist in the adoption of Indian children through tribal social services. The Academy also actively participated in the drafting and lobbying for the Responsible Father Registry currently before Congress as Senate Bill 3321 and House Bill 6035.

SUMMARY OF THE ARGUMENT

After this Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30 (1989), state courts remain divided over the application of the Existing Indian Family Doctrine (EIFD). The division among state appellate courts on whether the ICWA trumps state laws on birth father rights jeopardizes the constitutional rights and safety of birth mothers. The division vitiates this Court's jurisprudence on birth parents' rights and weakens state and federal legislative efforts to protect all parties to adoption. The Court should therefore grant certiorari to clarify this important area of law.

ARGUMENT

I. POST *HOLYFIELD*, STATE COURTS REMAIN DEEPLY DIVIDED OVER THE APPLICATION OF THE EXISTING INDIAN FAMILY DOCTRINE

In its enactment of the Indian Child Welfare Act (ICWA) Congress set forth a Congressional Declaration of Policy, which states:

> [I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families *by the establishment of minimum Federal standards for the removal of Indian children from their families* and the placement of such children in foster or adoptive homes . . . .

25 U.S.C.A. § 1902 (West 2012)(emphasis added). The ICWA also provides that in a termination of parental rights proceeding the following requirement must be met:

> No termination of parental rights may be ordered . . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, *that the continued custody of the child by the parent or Indian custodian* is likely to result in serious emotional or physical damage to the child.

25 U.S.C.A. §1912(f) (West 2012) (emphasis added).

The above-cited sections of the ICWA have led many state appellate courts to adopt the EIFD. The EIFD was first recognized by the Kansas Supreme Court in *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982). In adopting the EIFD, the court found that where an infant is born out-of-wedlock to a non-Indian mother and where the child had spent his entire life in the care of non-Indians and has not been removed from an Indian family, application of the ICWA would violate the intent of Congress rather than uphold the law's intended purpose. *Id.* at 175.

Since being adopted by in 1982, the EIFD has been recognized by a significant number of state appellate courts. *See In re Interest of S.A.M.*, 703 S.W.2d 603, 607-08 (Mo. Ct. App. 1986); *Claymore v. Serr*, 405 N.W.2d 650, 653-54 (S.D. 1987); *In re Adoption of*

T.R.M., 525 N.E.2d 298, 303 (Ind. 1988); *In re Adoption of Crews*, 825 P.2d 305, 309-10 (Wash. 1992); *In the Matter of S.C.*, 833 P.2d 1249 (Okla. 1992); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995); *Rye v. Weasel*, 934 S.W.2d 257, 262-64, (Ky. 1996); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520-21 (Ct. App. 1996); *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 683-87 (Ct. App. 1996); *In re Morgan*, 1997 Tenn. App. LEXIS 818, *43-44 (Ct. App. 1997); *Crystal R. v. Super. Ct.*, 69 Cal. Rptr. 2d 414, 415 (Ct. App. 1997); *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715-717 (Ct. App. 2001); *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009).

Alabama has also adopted the EIFD, but has limited its application solely to cases involving a voluntary relinquishment of parental rights for the child's adoption and where the child is born out-of-wedlock to a non-Indian mother. *See S.A. v. E.J.P.*, 571 So. 2d 1187, 1189-90 (Ala. Ct. App. 1990); *Ex parte C.L.J.*, 946 So. 2d 880, 889 (Ala. Ct. App. 2006).

The South Carolina Supreme Court case at issue, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012), places South Carolina in the company of state appellate courts who have rejected the EIFD. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 558 n.17 (S.C. 2012); *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of T.N.F.*, 781 P.2d 973, 976-77 (Alaska 1989); *In re Crystal K.*, 276 Cal. Rptr. 619, 624-25 (Ct. App. 1990); *In re Adoption of Baade*, 462 N.W.2d 485, 489-90 (S.D. 1990); *Adoption of Lindsay C.*, 229 Cal. App. 3d 404, 415 (Ct. App. 1991); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S. S.*, 622 N.E.2d 832, 838-39 (Ill. App. Ct. 1993); *In re D.A.C.*, 933 P.2d 993, 997-1000 (Utah App. 1997); *In re*

Alicia S., 65 Cal. App. 4th 79, 90-92 (Ct. App. 1998); *Michael J. Jr. v. Michael J. Sr.*, 7 P.3d 960, 963-64 (Ariz. Ct. App. 2000); *In re Baby Boy L.*, 103 P.3d 1099, 1105 (Okla. 2004); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 315 (App. Div. 2005); *In re Vincent M.*, 150 Cal. App. 4th 1247, 1251 (Cal. Ct. App. 2007); *In re Petition of N.B.*, 199 P.3d 16, 20-22 (Colo. App. 2007); *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009).

The above list of cases includes California, Kansas, Oklahoma, and South Dakota decisions, which originally adopted the EIFD, as well as these state appellate courts' subsequent post-*Holyfield* decisions rejecting the EIFD. While numerous states (California, Iowa, Oklahoma, Washington, and Wisconsin) have rejected the EIFD by passage of state statutes, it is highly unlikely these statutes can lawfully restrict state courts from interpreting the federal ICWA regarding its application. CAL. FAM. CODE § 175 (West 2012); CAL. WELF. & INST. CODE § 224 (West 2012); IOWA CODE § 232B.5(2) (West 2012); OKLA. STAT. ANN. tit. 10, §§ 40.1, 40.3 (West 2012); WASH. REV. CODE ANN. §§ 13.34.040(3) and 26.33.040(1)(a) (West 2012); WIS. STAT. ANN. § 48.028(3) (West 2012). In California, where the EIFD has been banned pursuant to legislation, (CAL. FAM. CODE § 175, CAL. WELF. & INST. CODE § 224), such legislation cannot be legally controlling given the EIFD was adopted in California based upon constitutional considerations. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520-21 (Cal. App. 1996).

In decisions adopting the EIFD, state appellate court decisions state that the ICWA should not be applied to cases where the child is not part of an intact Indian family and is not residing on an Indian reservation. Many of these decisions also involved

voluntary adoptions proceedings where the child was not being involuntarily removed from the child's family. As is readily apparent, a significant number of state appellate court decisions have reached the opposite conclusion and state that Congress intended the ICWA to apply to all cases involving an Indian child.

Unfortunately, now thirty years since the EIFD was first recognized in the *Baby Boy L.* decision, this Court has yet to clarify the appropriateness of the EIFD. The Court's only decision regarding the ICWA is *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). In *Holyfield*, twins were born out-of-wedlock to an Indian mother, who resided on the Choctaw reservation. *Id.* at 30. The children were born off the reservation where their mother immediately placed them from the hospital into an adoptive placement. *Id.* In *Holyfield,* this Court found that, pursuant to 25 U.S.C. section 1911(a), the tribal court had exclusive jurisdiction, and the adoption proceeding should not have occurred in Mississippi state court. *Id.* The *Holyfield* decision does not address the validity of the EIFD.

Since the 1989 *Holyfield* decision, numerous state appellate courts have rejected the EIFD finding that the *Holyfield* decision mandates the rejection of the EIFD. Based upon the *Holyfield* decision, the Kansas Supreme Court is now one of the states that have overturned its earlier holding in *Baby Boy L.* and has now rejected the EIFD. *In the Matter of A.J.S.*, 204 P.3d 543, 551 (Kan. 2009).

While the Kansas Supreme Court has now rejected the EIFD, numerous other state appellate courts continue to recognize the EIFD. As recently as 2009, the same year the Kansas Supreme Court rejected the

EIFD, the Nevada Supreme Court recognized and adopted the EIFD. *In re the Parental Rights as to N.J.*, 221 P.3d 1255, 1258 (Nev. 2009).

In rejecting its earlier recognition of the EIFD, the Kansas Supreme Court stated that the continued acceptance of the EIFD "would undermine the significant tribal interests recognized by the Supreme Court in *Holyfield*." *In re A.J.S.*, 204 at 550.

After the *Holyfield* decision, other states rejecting the EIFD have likewise stated that implementation of the EIFD would undermine the significant tribal interests recognized by the Supreme Court in *Holyfield*. *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *In re Adoption of Baade*, 462 N.W.2d 485, 489-90 (S.D. 1990); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of Quinn*, 845 P.2d 206, 209 (Ore. Ct. App. 1993); *In re Elliott*, 554 N.W.2d 32, 35-36 (Mich. Ct. App. 1996); *In re Baby Boy C.*, 27 A.D.3d 34, 48 (N.Y. App. 2005).

These decisions and others have interpreted *Holyfield* as placing tribal rights on parity with those of parents and children despite the fact that tribal rights are strictly statutory in nature. These cases fail to adequately examine and discuss the constitutional aspects of this interpretation of *Holyfield*. Post *Holyfield*, other state appellate courts have rejected *Holyfield* as requiring the rejection of the EIFD. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520-22 (Cal. Ct. App.1996); *Rye v. Weasel*, 934 S.W.2d 257, 261-62 (Ky. 1996); *In re Morgan*, 1997 Tenn. App. LEXIS 818, *43-44 (Ct. App. 1997).

II. THE *HOLYFIELD* DECISION HAS BEEN WIDELY MISCONSTRUED BY STATE APPELLATE COURTS AS HOLDING THAT TRIBAL RIGHTS ARE ON PARITY WITH THE CONSTITUTIONAL RIGHTS OF PARENTS AND CHILDREN

The ICWA grants Indian tribes only statutory rights, whereas, in addition to statutory rights, in these cases parents have fundamental constitutional rights. *See Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000); *In re N.N.E.*, 752 N.W.2d 1, 8-9 (Iowa 2008). Children have significant constitutional rights, as well as statutory rights. *See In re Gault*, 387 U.S. 1, 13 (1967); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506-07 (1969); *In re Jasmon O.*, 8 Cal. 4th 398, 419 (Cal. 1994); *In re J.L.*, 779 N.W.2d 481, 489 (Iowa 2009). In cases addressing the EIFD, widespread misconception exists that Indian tribes have rights equal to those of parents and children. This misconception occurs because this Court's statement in *Holyfield* is taken out of context.

The *Holyfield* decision held that where Indian children were born off the tribal reservation but their unmarried mother's domicile was the Choctaw reservation, the tribal court had exclusive jurisdiction pursuant to the ICWA. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53-54 (1989). The *Holyfield* decision was limited solely to the issue of determining state court versus tribal court jurisdiction. *Id.*

In addressing exclusive tribal court jurisdiction in cases involving Indian children that reside or are domiciled on a tribal reservation, the U.S. Supreme Court cited the Utah Supreme Court decision *In re*

Adoption of Halloway, 732 P.2d 962, 969-970 (Utah 1986). *Halloway*, likewise, addressed jurisdiction involving an Indian child domiciled on an Indian reservation. *Id.* at 962.

This Court cited a portion of *Halloway* which states: *"that the tribe has an interest in the child which is distinct from but on parity with the interest of the parent."* *Holyfield*, 490 U.S. at 52 (citing *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986)) (emphasis added). This statement is often taken out of context and cited by those arguing that the rights of Indian tribes are equal to the rights of parents and children. This statement by this Court was addressing situations involving Indian children *who are domiciled on a reservation* and subject to exclusive tribal court jurisdiction. The complete quote from *Halloway*, as cited by this Court, states:

> To the extent that [state] abandonment law operates to permit [the child's] mother to change [the child's] domicile as part of a scheme to facilitate his adoption by non-Indians *while she remains a domiciliary of the reservation*, it conflicts with and undermines the operative scheme established by subsections [1911(a) and [1913(a)] *to deal with children of domiciliaries of the reservation* and weakens considerably the tribe's ability to assert its interest in its children. *The protection of this tribal interest* is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. *This relationship between Indian tribes and Indian children domiciled on the reservation* finds no parallel in other ethnic cultures found in the United States. It is a relationship that many

> non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for non-domiciliary Indian children. [State] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of the parents.

Id. (citing *In re Adoption of Halloway*, 732 P.2d 962, 969-70 (Utah 1986)) (emphasis added). The *Holyfield* decision does not state that the rights of Indian tribes are on parity with the constitutional protections afforded to parents and children.

Holyfield, rather than clarifying the rights of Indian tribes, children and children's parents pursuant to the ICWA, has actually led to further confusion among the states regarding EIFD. This case presents an opportunity for this Court to clarify whether the EIFD furthers the intent of Congress in its enactment of the ICWA or whether such interpretation is inappropriate.

The uncertainty as to the EIFD application has a profound impact upon Indian children. The Court should grasp this opportunity to correct the widely held misconception that tribal rights are on parity with the constitutional rights of parents and children.

III. State Courts Are Divided In Applying ICWA To Trump State Laws On Birth Father Rights And This Jeopardizes The Safety of Birth Mothers

South Carolina's decision adds it to Alaska and Arizona as states allowing ICWA to trump state law definitions of "parent." Pet. for Writ. of Cert. 16. Conversely, California, Oklahoma, Missouri, New Jersey and Texas do not allow ICWA to create unwed fathers parental rights that do not exist under state law. Pet. for Writ. of Cert. 15-16. The uncertainty created by the conflicting state interpretations of ICWA expands opportunities for abusive men to harm women pregnant with an Indian child. A putative father can refuse to assume legal or financial responsibility for a fetus or child, eliminating him as a parent under state law (*E.g.* Pet. App. 20a-23a) but still use the threat of invoking or the actual invocation of the ICWA placement preferences to manipulate the mother whose adoption decision is typically financially motivated and steered by her personal placement selection of an adoptive family. *See* App. A[2]; Leigh Gaddie, *Open Adoption*, 22 J. AM. ACAD. MATRIM. LAW. 499, 508 (2009) ("A sense of control may come with playing a part in selecting the adopting family, reinforcing that adoption was the best decision for the child.")

Such abuse occurred in the instant case where the putative Father refused Mother's request for financial support during her pregnancy unless she married

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[2] Appendix A is an unpublished summary compiled by an Act of Love Adoption Agency, a Utah licensed child placing agency, on reasons cited by their last fifty relinquishing mothers for adoptive placement. Thirty-nine of fifty birth mothers listed finances as a reason for placement.

him. Pet. App. 4a, n. 4. Birth fathers' support obligations are independent of marital status as are women's support needs for medical bills, transportation, clothing, and lost wages during a pregnancy. *See* Pet. App. 67a-68a (Kittredge, J., dissenting) ("[An unwed father] must provide support regardless of whether his relationship with the mother-to-be continues or ends.") (quoting *Roe v. Reeves*, 708 S.E.2d 778, 783 (2011)); Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 653-57 (2011); Shari Motro, Op-Ed., *Responsibility Begins at Conception*, N.Y. TIMES, July 6, 2012, http://www.nytimes.com/2012/07/07/opinion/time-for-pregnancy-support-alimony.html.

In the instant case putative Father provided no support despite Mother's request and his knowledge of the pregnancy. Such financial manipulation is typical in abusive relationships and works to force the victim to stay in the relationship, deprive her of necessary monies for herself or her children, and keep her financially dependent upon the abuser. *See Economic Abuse Fact Sheet*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE PUB. POL'Y OFFICE, http://www.uncfsp.org/projects/userfiles/File/DCE-STOP_NOW/NCADV_Economic_Abuse_Fact_Sheet.pdf ("By controlling and limiting the victim's access to financial resources, a batterer ensures that the victim will be financially limited if he/she chooses to leave the relationship."); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 888 (1992). In the instant case, Mother testified that she chose adoption because she had two other children and was struggling financially. Pet. App. 4a. Mother testified that she asked Father to either pay support or surrender his parental rights, and that Father's agreement to terminate his rights and his refusal to provide support factored into Mother's decision to relinquish the child. Pet. App. at

45a-46a (Kittredge, J., dissenting). Mother declined to marry Father, their relationship soured, and Father never provided support to Mother. Pet. App. 3a-4a. Mother carried the fetus to term assumedly relying on Father's non-support as giving her control of the child and her adoption plan as provided by South Carolina law. Pet. App. 7a.

The Father invoked ICWA – wresting control of the child from Mother and her placement choice – and transferred the child to Father's Indian family. Pet. App. 11a. Because a birth mother's selection of an adoptive family is the single factor that benefits her most in recovering from relinquishment, transferring Baby Girl to a family other than the one Mother had selected during her pregnancy and had present for delivery undermines Mother's relinquishment recovery. Mary Beck, *A National Putative Father Registry*, 36 CAP. U. L. REV. 295, 296 n. 10 (2007); Leigh Gaddie, *Open Adoption*, 22 J. AM. ACAD. MATRIM. LAW. 499, 508 (2009). Mother's testimony supports such an assumption. Pet. App. 98a (Kittredge, J., dissenting) ("Birth mother has consistently expressed her desire that Baby Girl be placed with Appellants.").

Domestic violence is characterized by coercive control of a victim through physical, sexual, psychological or financial abuse. Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 430-431 (2011). Physical abuse and sexual assault are easily recognized as domestic violence; psychological and financial manipulation are less recognized by the public but nonetheless constitute abuse. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 889 (1992); *Economic Abuse Fact Sheet*,

NAT'L COAL. AGAINST DOMESTIC VIOLENCE PUB. POL'Y OFFICE, http://www.uncfsp.org/projects/userfiles/File/DCE-STOP_NOW/NCADV_Economic_Abuse_Fact_Sheet.pdf. ("By controlling and limiting the victim's access to financial resources, a batterer ensures that the victim will be financially limited if he/she chooses to leave the relationship."); ELIZABETH M. SCHNEIDER ET AL., *Domestic Violence and the Law: Theory and Practice* 7, n. 1 (2d ed. 2008). The failure of the public to recognize non-physical forms of domestic violence is seen in the instant case where the South Carolina Supreme Court failed to mention as abusive Father's marriage-or-no-support ultimatum to Mother. Mother was never asked about abuse and never characterizes herself as abused at least in the part of the record that is open to these authors.

Abuse is exacerbated in pregnancy. *Planned Parenthood*, 505 U.S. at 889 ("The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy."); Donna St. George, *CDC Explores Pregnancy-Homicide Link*, WASH. POST, Feb. 23, 2005, at A05. Abusers enlist children into their manipulations to maintain control over victims. Evan Stark, *A Failure to Protect: Unraveling "The Battered Mother's Dilemma"*, 27 W. ST. U. L. REV. 29, 49 (2000); Evan Stark, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 38 (2007).

The risk of injury and death to American pregnant women is not speculative. One in four American women will experience domestic violence in her lifetime. *Domestic Violence Facts*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE PUB. POL'Y OFFICE, http://www.ncadv.org/files/domesticviolencefactsheet(national).pdf. The Center for Disease Control reports that homicide

is the second leading cause of injury related death for pregnant women and that it claims a greater proportion of pregnant than non-pregnant women. Rebekah Kratochvil, *Intimate Partner Violence During Pregnancy: Exploring the Efficacy of a Mandatory Reporting Statute*, 10 HOUS. J. HEALTH L. & POL'Y 63, 69 (2009).[3] Thirty-one percent of deaths of pregnant and postpartum women result from domestic violence and thirty-three percent of female homicides result from domestic violence. Mary Beck, *A National Putative Father Registry*, 36 CAP. U. L. REV. 295, 311 (2007).

Native American Indian families experience domestic violence at the highest rate of any group in the United States. Amanda Tucker, *The Indian Child Welfare Act's Unconstitutional Impact on the Welfare of the Indian Child*, 9 WHITTIER J. CHILD & FAM. ADVOC. 87, 109 (2009). What constitutes a shockingly high level of violence, injury, and mortality for women, particularly pregnant women, in a non-Indian family becomes noticeably greater in Indian families.

Allowing putative fathers to financially abuse women they have impregnated tacitly sanctions other forms of abuse and inescapably exposes pregnant women to the escalation of abuse and to domestic homicide.

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[3] Although the Center's reported statistics did not isolate domestic violence from other pregnancy related violence, "'in the vast majority of cases, violence against pregnant women is perpetrated by an intimate [partner].'" *Id.* (quoting Jeani Chang et al., *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States, 1991-1999*, 95 AM. J. PUB. HEALTH 3, 471, 474 (2005)).

Census 2010 data show that "the multiracial population is overwhelmingly young, and that . . . American Indians and Native Hawaiians and Pacific Islanders are the most likely to report being of more than one race." Susan Saulny, *Census Data Presents Rise in Multiracial Population of Youths*, N.Y. TIMES, March 24, 2011, http://www.nytimes.com/2011/ 03/25/ us/25race.html?_r=0. The mixing of races in the United States, including American Indians, results in a nation increasingly multiracial. Census 2000 data show that "more than 1 in 6 adopted kids is of a different race from their parents and "about 1 in 15 marriages in the U.S. is interracial – up from 1 in 23 in 1990." Mary Wiltenburg, *All in the (Mixed-Race) Family: A U.S. Trend*, CHRISTIAN SCIENCE MONITOR, August 28, 2003, http://www.csmonitor. com/2003/08 28/p03s01-ussc.html. The ubiquitous conception of multiracial children necessarily results in children whose heritage is difficult to identify.

Uncertainty over children's tribal heritage and over when putative fathers have rights to block an adoption in at least forty two states combined with the prevalence of abuse to pregnant women and in Indian families puts women's and fetuses' health and lives at risk and interferes with birth mothers' selections of adoptive families. Few families will agree to an adoption plan where tribal membership is indefinite and where neither state nor federal law can reliably identify putative fathers with rights to block an adoption.

IV. THE DIVISION IN STATE COURTS HOLDINGS IN APPLYING ICWA TO TRUMP STATE LAWS ON BIRTH FATHER RIGHTS VITIATES UNITED STATES SUPREME COURT JURISPRUDENCE ON BIRTH PARENTS' RIGHTS AND WEAKENS STATE AND FEDERAL LEGISLATIVE EFFORTS TO PROTECT ALL PARTIES TO ADOPTION.

Adoptive Couple v. Baby Girl, the South Carolina Supreme Court decision allowing ICWA to trump state law definitions of unwed fathers, conflicts with this Court's significant jurisprudence in the area of non-marital fathers' rights. Adoption attorneys and legislators have relied since 1972 on this Court's decision in *Stanley v. Illinois*. 405 U.S. 645 (1972).

The decision at issue is inconsistent with the Congressional intent of the ICWA, as *Stanley* (decided in 1972) and *Quilloin* (decided in January 1978) were already reported by the time ICWA defined unwed father in 25 U.S.C. § 1903(9) in November 1978. The legislative history states the ICWA definition of parent is *not* meant to conflict with the Supreme Court's decision in *Stanley v. Illinois*. H.R. Rep. No. 95-1386, at 21, 95th Cong. (1978), reprinted in 1978 U.S. Code Cong. Ad News at 7543.

In *Stanley*, this Court found that the Due Process Clause required the State of Illinois to provide a fitness hearing to a non-marital father before adjudicating his children dependents of the state after their mother's death. *Stanley*, 405 U.S. at 649. The non-marital father had lived with and supported these children their entire lives. *Id.* at 650, n. 4. The Court's holding stood for the proposition that the Constitution would protect the interests of a non-marital father who had assumed responsibilities for childrearing.

Subsequently, this Court clarified the parameters of that rule. It denied such protection to fathers who do not grasp the opportunity to parent in *Quilloin v. Walcott* and *Lehr v. Robertson* and granted protection to a father who did grasp the opportunity in *Caban v. Mohammed*. *See Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979).

In *Quilloin*, this Court held that a father's substantive due process rights were not offended in a step-parent adoption where the putative father had not established his paternity nor shouldered significant child rearing responsibilities. 434 U.S. at 246.

In *Caban*, this Court held that a non-marital father's rights were offended where adoption was granted absent his consent. *Caban*, 441 U.S. at 394. The birth father's name appeared on the children's birth certificates, and he had supported his children and seen them frequently over their lives. *Id.* at 382. Thus, this Court protected the rights of a non-marital father who had assumed parental responsibilities.

In *Lehr*, this Court held constitutional New York's putative father registry statute, which eliminated the need to provide notice to a non-marital father who had not established his paternity nor shouldered "custodial, personal, or financial relationship" with his child. *Lehr v. Robertson*, 463 U.S. 248, 262-65 (1983). These dual *Lehr* holdings on putative father registries and constitutional protection for responsible unwed fathers have shaped the formation of legislation and case law on non-marital father rights.

The *Lehr* Court distilled the first rule as follows:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by

> "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the due process clause.

Id. at 261 (quoting *Caban*, 441 U.S. at 392). This holding, that the Constitution protects the father who assumes parental responsibility, has guided prenatal abandonment laws like the one in the instant South Carolina case that denied the status of parent to the putative father. Pet. App. 21a-22a.

Lehr recognized that developing a relationship with a child was dependent upon the will of both parents and that New York's special statutory scheme protected non-marital fathers' rights independent of mothers' wishes. *Lehr*, 463 U.S. at 263. This Court, in upholding the New York putative father registry's constitutionality, discussed the statutory registry scheme as follows:

> After this Court's decision in *Stanley*, the New York Legislature . . . . enacted a statutory adoption scheme that automatically provides notice to seven categories of putative fathers who are likely to have assumed some responsibility for the care of their natural children. . . . The New York legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers,... and impair the desired finality of adoption decrees. . . . [W]e surely cannot characterize the state's conclusion as arbitrary.

Id. at 263-64. This holding paved the way for enactment of other state registries. Mary Beck, *Putative*

Father Registries: An Overview in ADOPTION FACTBOOK V 515, 515 n. 1 (Rosman et al., ed., 2011).

Paternity registries provide a means for timely, registered non-marital fathers to guarantee notice to themselves of an adoption or dependency action where they have not established legal paternity or otherwise constitutionally protected their interests. Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1039-42 (2002). The mother of a child is easily identified because she is present at birth. *See Lehr*, 463 U.S. at 260, n. 16. The non-marital father's identity is harder to ascertain and he may be elsewhere at the time of birth. States have enacted the multi-purpose putative father registry laws so that fathers may register despite their location or fraudulent and/or antagonistic mothers. *See* Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y at 1049. Registries also protect the privacy and safety of mothers by relieving them of the requirement to notify men of pregnancy and/or adoption plans, either of which would expose them to the potential for domestic violence and/or the need to identify a rapist. *Id.* at 1052-53. South Carolina has such a putative father registry law but it was not discussed in the instant opinion. *See* S.C. CODE ANN. §§ 63-7-2530, 63-7-2550, 63-9-810, 63-9-820, 63-9-730(B) (2012).

Lehr clarified what paternal activities trigger constitutional protection of fathers' rights and that registries create a constitutional means of determining which fathers get notice. *Stanley*, *Quilloin*, *Caban* and *Lehr* clarified that the Constitution protects certain non-marital fathers. This collective jurisprudence has guided the development of state and

national putative father registry and prenatal abandonment law since 1972. Up to thirty-four states have enacted putative father registries although some exist without protections for putative fathers or mothers, so the number of *functional* registries is in the mid-twenties. *See* Mary Beck, *Putative Father Registries: An Overview* in ADOPTION FACTBOOK V 515, 515 n. 1 (Rosman et al., ed., 2011).[4] Twenty-three states have either enacted prenatal support laws or have judge-made standards of prenatal support.[5] Together, registries and prenatal support laws protect non-marital fathers who take affirmative steps to assert paternity as well as protecting the privacy and safety of birth mothers. *See* Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1052 (2002). The South Carolina decision abrogates this jurisprudence and weakens the protections state have erected to protect birth parents.

The protections offered by state registry and prenatal abandonment laws do not protect the non-marital father in interstate adoption/dependency actions. *See* Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y at 1033. While a father may register in the state of conception, the birth may occur in a second state, and the adoption may be filed in a third state. A father may register in

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[4] Note from Mary Beck, author of the article cited. The text of ADOPTION FACTBOOK V has misprinted that as many as 38 states have adopted putative father registries. Reference note 1 on page 515 of the same source, which explains that there are 34 states with putative father registries.

[5] *See* Appendix 2, an unpublished grid of states with prenatal abandonment standards, researched and compiled by Diamond Scott.

the conception state but be unaware of the states of birth or adoption. A national registry linking all state registries is the only way to promote the purposes of state registries for putative fathers. *Id.* at 1078. Senator Mary Landrieu wrote the Responsible Father Registry, a national bill that would link state registries and protect putative fathers and birth mothers. In 2012, Senator Landrieu introduced Senate Bill 3321 into the United States Senate and Representative Laura Richardson introduced House Resolution 6035 into the United States House of Representatives. S. 3321, 112th Congress (2012); H.R. 6035, 112th Congress (2012). The purposes of S. 3321 and H.R. 6035 (identical bills) include: to provide a national database that links the state registries, to facilitate transmission of state registrations to the national data base, to respond to authorized state search results on any woman, to require appropriate notice of adoption or dependency proceedings to timely registered fathers (S. 3321 § 2(b)(1)), to protect the rights of men in adoption, termination of rights and dependency (§ 2(a)(5)), and to protect the privacy and safety of mothers (§§ 2(a)(4), 2(b)(3)). The bill recommends that states develop prenatal abandonment laws (§ 442(a)(9)), which would create a standard by which men can protect their parental rights outside of the registry process.

State registries and prenatal abandonment laws create bright line rules about which putative fathers have consent rights in state adoptions. The federal registry is intended to link state registries and promote interstate protections for all birth parents. In the absence of guidance from this Court, ICWA is allowed to trump state laws and United States jurisprudence on putative fathers' rights in some states

and not others. Such division undercuts both federal and state efforts to protect the rights of birth parents.

CONCLUSION

This Court should review the South Carolina decision because confusion over EIFD has led to inconsistent state decisions allowing the statutory rights of Indian tribes to supersede the constitutional rights of non-Indian mothers, because the decision exposes birth mothers to abuse and abrogates stalwart state and federal efforts to protect birth parents. For the foregoing reasons and those stated in the petition, this Court should grant the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Logo]
A Brighter Tomorrow
For Today's Children
ALTERNATIVE OPTIONS & SERVICES
A Non-Profit Adoption Agency

October 25, 2012

Dear Ms. Beck,

At your request, Act of Love Adoption Agency is providing you with data regarding the reasons birthparents have chosen to place their babies for adoption with Act of Love. The data we are providing to you has been collected from our files for the last 50 birthparents who have placed their babies for adoption with Act of Love. The reasons we have listed have been provided directly to us by the birth parents.

Act of Love Adoption Agency is a 501 (c)(3) non-profit, licensed adoption agency, in the state of Utah. The agency provides services for those seeking to adopt a child or those considering placing a child for adoption. The primary focus of the agency is domestic infant adoptions with an emphasis on providing excellent individualized service.

Act of Love is a full-service child placing agency offering adoptive family and birth parent services. For birth parents we provide, among other services, pregnancy counseling, medical, housing, financial and legal assistance, educational resources and support before and after an adoption plan. Adoptive parent services, among others, include counseling and Adoptive Parenting Preparation Classes, home

study preparation, and placement and post-placement services.

The staff at Act of Love is comprised of loving and caring individuals. Each staff member is an adoptive parent, birth parent, adoptee or has extensive experience in adoption. Act of Love is committed to fulfilling the needs of each child, birth parent and adoptive family.

Sincerely,

Jill J. Willey, COO

/s/ Larry S. Jenkins
CC: Larry S. Jenkins

Attachment

Birth Parent	Birthparent Reason for Placing Provided directly by Birth Parents to Act of Love Adoption Agency Prepared 10/29/2012
1	financial
2	tried to raise baby - lack financial, emotional support
3	age, lack of education, financial
4	financial
5	financial, wants stable home
6	financial, lack of education, wants stable home
7	financial, lack support from birth father
8	financial, birth father in prison
9	living circumstances, financial, conception was one-night stand and doesn't know how to contact
10	financial, housing circumstance, lack of necessary resources to raise a child
11	feels adoption is in the best interest of the child/conception involved birth mom waking up next to a man in the morning
12	best interest of the child
13	financial, best interest of child
14	financial, best interest of child
15	financial, best interest of child
16	financial, not in a place to parent
17	financial, best interest of child
18	financial, best interest of child
19	living circumstances, financial, birth father not in contact since 4 months along
20	financial, wants baby to have stable parents
21	financial, chose not to name due to negative relationship & domestic dispute at

	time of conception
22	financial, desire for child be with a family that can give more opportunities
23	good home with stable parents
24	good home with stable parents, birth father incarcerated
25	raising 2 other children, financial
26	living circumstances, financial, best interest of child
27	financial, wants more opportunities for baby
28	best interest of the child/want a stable home
29	financial, living circumstances
30	best interest, baby deserves 2 parent home, birth father told her to get an abortion
31	financial reasons, 8 other children
32	financial, wants stable home
33	financial, birth father in prison
34	financial, best interest
35	rape
36	financial, best interest
37	financial, best interest
38	financial, best interest, birth father abusive
39	best interest
40	financial, emotionally not ready to parent
41	not ready to parent another child, best interest
42	tried to parent and could not - best interest of child
43	financial, not ready to parent another child
44	financial, housing circumstance, one-night stand and only knew 1st name
45	financial, best interest

46	financial, not emotionally stable, birth father told her to get an abortion
47	financial, best interest
48	financial, best interest
49	financial, best interest, raising other children
50	best interest

APPENDIX B

Relevant Prenatal Abandonment Statutes and Case Law by State

Alabama
Ala. Code 1975 § 26-10A-9 (2012)

Wording of Statute

(a) A Consent or relinquishment required by Section 26-10A-7 may be implied by any of the following acts of a parent: (1) Abandonment of the adoptee. Abandonment includes, but is not limited to, the failure of the father, with reasonable knowledge of the pregnancy, to offer financial and/or emotional support for a period of six months prior to birth.

Colorado
C.R.S.A. § 19-5-105(C)(III) (2012)

Wording of Statute

(c) That the parent has not promptly taken substantial parental responsibility for the child. In making this determination the court shall consider, but shall not be limited to, the following: (III) Whether the birth father has failed to substantially assist the mother in the payment of the medical, hospital, and nursing expenses, according to that parent's means, incurred in connection with the pregnancy and birth of the child.

Florida
West's F.S.A. § 63.089 (2012)

Wording of Statute

(3) GROUNDS FOR TERMINATING PARENTAL RIGHTS PENDING ADOPTION. The court may enter a judgment terminating parental rights pending adoption if the court determines by clear and

convincing evidence, supported by written findings of fact, that each person whose consent to adoption is required under s. 63.062:

(d) Has been properly served notice of the proceeding in accordance with the requirements of this chapter and has failed to file a written answer or PERSONALLY appear at the evidentiary hearing resulting in the judgment terminating parental rights pending adoption;

(4) FINDING OF ABANDONMENT. A finding of abandonment resulting in a termination of parental rights must be based upon clear and convincing evidence that a parent or person having legal custody has abandoned the child in accordance with the definition contained in s. 63.032. A finding of abandonment may also be based upon emotional abuse or a refusal to provide reasonable financial support, when able, to a birth mother during her pregnancy OR ON WHETHER THE PERSON ALLEGED TO HAVE ABANDONED THE CHILD, WHILE BEING ABLE, FAILED TO ESTABLISH CONTACT WITH THE CHILD OR ACCEPT RESPONSIBILITY FOR THE CHILD'S WELFARE.

(a) In making a determination of abandonment at a hearing for termination of parental rights under this chapter, the court shall consider, among other relevant factors not inconsistent with this section:

1. Whether the actions alleged to constitute abandonment demonstrate a willful disregard for the safety or welfare of the child or the unborn child;

2. Whether the person alleged to have abandoned the child, while being able, failed to provide financial support;

3. Whether the person alleged to have abandoned the child, while being able, failed to pay for medical treatment; or

4. Whether the amount of support provided or medical expenses paid was appropriate, taking into consideration the needs of the child and relative means and resources available to the person alleged to have abandoned the child.

Georgia

Ga. Code Ann.§ 19-8-4(e1)(3)(A)(2012)

Wording of Statute

(3)(A) The biological father who is not the legal father of a child may execute a surrender of his rights to the child prior to the birth of the child for the purpose of an adoption pursuant to this Code section. A pre-birth surrender, when signed under oath by the alleged biological father, shall serve to relinquish the alleged biological father's rights to the child and to waive the alleged biological father's right to notice of any proceeding with respect to the child's adoption, custody, or guardianship. The court in any adoption proceeding shall have jurisdiction to enter a final order of adoption of the child based upon the pre-birth surrender and in other proceedings to determine the child's legal custody or guardianship shall have jurisdiction to enter an order for those purposes.

Idaho

I.C. § 16-1504(2)(b)(iii)(2012)

Wording of Statute

(2) In accordance with subsection (1) of this section, the consent of an unmarried biological father is necessary only if the father has strictly complied with the requirements of this section. (b) With regard to a

child who is under six (6) months of age at the time he is placed with adoptive parents, an unmarried biological father shall have manifested a full commitment to his parental responsibilities by performing all of the acts described in this subsection prior to the placement for adoption of the child in the home of prospective parents or prior to the date of commencement of any proceeding to terminate the parental rights of the birth mother, whichever event occurs first. The father shall: (iii) If he had actual knowledge of the pregnancy, pay a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his means, and when not prevented from doing so by the person or authorized agency having lawful custody of the child.

Iowa
I.C.A. § 600A.8(3)(2)(d)(2012)

Wording of Statute

3. The parent has abandoned the child. For the purposes of this subsection, a parent is deemed to have abandoned a child as follows: (2) In determining whether the requirements of this paragraph are met, the court may consider all of the following:(d) With regard to a putative father, whether the putative father paid a fair and reasonable sum, in accordance with the putative father's means, for medical, hospital, and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child, or whether the putative father demonstrated emotional support as evidenced by the putative father's conduct toward the mother.

Kansas

K.S.A. § 59-2136(h)(1)(D)(2012)

Wording of Statute

(h)(1) When a father or alleged father appears and asserts parental rights, the court shall determine parentage, if necessary pursuant to the Kansas parentage act, K.S.A. 23-2201 et seq., and amendments thereto. If a father desires but is financially unable to employ an attorney, the court shall appoint an attorney for the father. Thereafter, the court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following: (D) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth.

Nebraska

Neb. Rev. St. § 43-104.22(7)(2012)

Wording of Statute

At any hearing to determine the parental rights of an adjudicated biological father or putative biological father of a minor child born out of wedlock and whether such father's consent is required for the adoption of such child, the court shall receive evidence with regard to the actual paternity of the child and whether such father is a fit, proper, and suitable custodial parent for the child. The court shall determine that such father's consent is not required for a valid adoption of the child upon a finding of one or more of the following: (7)The Father had knowledge of the pregnancy and failed to provide reasonable support for the mother during pregnancy.

Nevada
N.R.S. § 129.012(1) (2011)

Wording of Statute

Abandonment of a child means any conduct of one or both parents of a child which evinces a settled purpose on the part of one or both parents to forego all parental custody and relinquish all claims to the child.

New Jersey
N.J.S.A. § 9:3-46(2012)

Wording of Statute

In determining whether a parent has affirmatively assumed the duties of a parent, the court shall consider, but is not limited to consideration of, the fulfillment of financial obligations for the birth and care of the child, demonstration of continued interest in the child, demonstration of a genuine effort to maintain communication with the child, and demonstration of the establishment and maintenance of a place of importance in the child's life.

New Mexico
N.M.S.A. 1978, § 32A-5-3(4)(a)(2012)

Wording of Statute

(4) has openly held out the adoptee as his own child by establishing a custodial, personal or financial relationship with the adoptee as follows:(a) for an adoptee under six months old at the time of placement: 1) has initiated an action to establish paternity; 2) is living with the adoptee at the time the adoption petition is filed; 3) has lived with the mother a minimum of ninety days during the two-hundred-eighty-day period prior to the birth or placement of the adoptee; 4) has lived with the adoptee within the

ninety days immediately preceding the adoptive placement; 5) has provided reasonable and fair financial support to the mother during the pregnancy and in connection with the adoptee's birth in accordance with his means and when not prevented from doing so by the person or authorized agency having lawful custody of the adoptee or the adoptee's mother; 6) has continuously paid child support to the mother since the adoptee's birth in an amount at least equal to the amount provided in Section 40-4-11.1 NMSA 1978, or has brought current any delinquent child support payments; or 7) any other factor the court deems necessary to establish a custodial, personal or financial relationship with the adoptee.

New York
McKinney's DRL Sec. § 111(1)(e)(iii)(2012)

Wording of Statute

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows: (e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

Ohio

R.C. § 3107.07(B)(1)(c)(2011-2012)

Wording of Statute

(B) The putative father of a minor if either of the following applies: (1) The putative father fails to register as the minor's putative father with the putative father registry established under section 3107.062 of the Revised Code not later than thirty days after the minor's birth; (c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

Oklahoma

10 O.S. Supp. § 1998 60.6 (2012)

Wording of Statute

C. Consent to adoption is not required from a father or putative father of a minor born out of wedlock if: 1. The minor is placed for adoption within ninety (90) days of birth, and the father or putative father fails to show he has exercised parental rights or duties towards the minor, including, but not limited to, failure to contribute to the support of the mother of the child to the extent of his financial ability during her term of pregnancy.

South Carolina

Code 1967 § 63-9-310(5)(b)(2011)

(A) Consent or relinquishment for the purpose of adoption is required of the following persons: (5) the father of a child born when the father was not married to the child's mother, if the child was placed with the prospective adoptive parents six months or less after the child's birth but only if: (b) the father paid a

fair and reasonable sum, based on the father's financial ability, but for the support of the child or for expenses incurred in connect with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

South Dakota
T.C.A. § 36-1-102(1)(A)(iii)(2012)

(A) Consent or relinquishment for the purpose of adoption is required of the following persons: (5) the father of a child born when the father was not married to the child's mother, if the child was placed with the prospective adoptive parents six months or less after the child's birth, but only if: (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

Tennessee
V.T.C.A. Family Code § 161.001 (2011)

Wording of Statute

A biological or legal father has either willfully failed to visit or willfully failed to make reasonable payments toward the support of the child's mother during the four (4) months immediately preceding the birth of the child; provided, that in no instance shall a final order terminating the parental rights of a parent as determined pursuant to this subdivision (1)(A)(iii) be entered until at least thirty (30) days have elapsed since the date of the child's birth.

Texas
U.C.A. § 1953 78B-6-121(3)(d)(i)-(iii)(2012)

Wording of Statute

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence: H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from the child or failed to support the child since the birth.

Utah
15 V.S.A. § 3-504(a)(1)(B)(2012)

Wording of Statute

(3) Except as provided in Subsections (6) and 78B-6-122(1), and subject to Subsection (5), with regard to a child who is six months of age or less at the time the child is placed with prospective adoptive parents, consent of an unmarried biological father is not required unless, prior to the time the mother executes her consent for adoption or relinquishes the child for adoption, the unmarried biological father: (d) offered to pay and paid, during the pregnancy and after the child's birth, a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his financial ability, unless:(i) he did not have actual knowledge of the pregnancy;(ii) he was prevented from paying the expenses by the person or authorized agency having lawful custody of the child; or (iii) the mother refuses to accept the unmarried

biological father's offer to pay the expenses described in this Subsection (3)(d).

Vermont
In re Infant Child Skinner, 982 P.2d 670
(Wash. Ct. App. 1999)

Wording of Statute

(1) In the case of a minor under the age of six months at the time the petition is filed, the respondent did not exercise parental responsibility once he or she knew or should have known of the minor's birth or expected birth. In making a determination under this subdivision, the court shall consider all relevant factors, which may include the respondent's failure to:

(A) pay reasonable prenatal, natal, and postnatal expenses in accordance with his or her financial means.

Washington
W.Va. Code § 48-22-306(b)(2)(2012)

Case law makes prenatal support of mother a determinative factor in whether or not the father has abandoned the child. Father's failure to support shows he did not make reasonable efforts despite mother cutting off ties with him.

West Virginia
W.S.A. § 48.415(6)(B)(2011)

Wording of Statute

Abandonment of a child less than 6 months shall be presumed if the birth father: (2) fails to contribute within his means toward the expense of prenatal and postnatal care of the mother and postnatal care of the child.

Wisconsin

Wording of Statute

"(b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy."

AMICUS CURIAE BRIEF

No. 12-399

In the Supreme Court of the United States

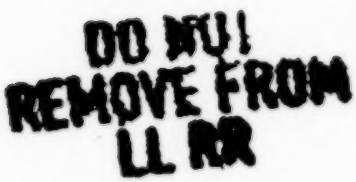
ADOPTIVE COUPLE,
Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

BRIEF OF *AMICA CURIAE* BIRTH MOTHER IN SUPPORT OF PETITIONERS



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QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963, applies to state custody proceedings involving an "Indian child." A dozen state courts of last resort are openly and intractably divided on two critical questions involving the administration of ICWA in thousands of custody disputes each year:

(1) Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

(2) Whether the undefined term "parent" in 25 U.S.C. § 1903(9) includes an unwed biological father who relinquished any parental rights he might have had under state law.

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INTEREST OF *AMICA CURIAE*[1]

This case presents an important question of federal law that has divided the state appellate courts, implicates thousands of custody disputes every year, and has a profound effect on the deeply personal, fundamental, and lawful choices made by child-bearing women: Whether the Indian Child Welfare Act (ICWA) may be invoked to block an adoption where (1) adoption proceedings were voluntarily initiated by a non-Indian mother who had sole custody of her child; (2) the Indian unwed biological father voluntarily relinquished any parental rights he might otherwise have had under state law; and (3) the undisputed evidence overwhelmingly established that the child's best interests would be served by finalizing the adoption.

Amica curiae Birth Mother is the biological and birth mother of Baby Girl, and is the single mother of two other children. After Baby Girl's biological father learned that Birth Mother was pregnant, he refused to provide any emotional or financial support unless Birth Mother agreed to marry him. Biological Father never offered to pay any of Birth Mother's medical or living expenses, or accompany her to a single doctor's visit,

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[1] Pursuant to Supreme Court Rule 37.2(a), *Amica* timely informed all parties of her intent to file a brief in support of Adoptive Couple's petition for certiorari. All parties consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *Amica* states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amica* and her counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

even though he was perfectly capable of doing so. After repeated failed attempts to get Biological Father to be involved in her pregnancy, Birth Mother ended the relationship. Shortly thereafter, she inquired again whether Biological Father wanted to support her and their child, or relinquish his parental rights. He responded via text message that he would not support her or the child and that he wanted to "give up" his parental rights. Pet. App. 89a.

Birth Mother was already struggling financially as a single mother of two children. She "wanted [her] little girl to have a chance." Pet. App. 46a. Unable to provide the stable two-parent home she wished for Baby Girl, Birth Mother decided that it would be in Baby Girl's best interest to be placed with a loving adoptive family. She hand-picked petitioners, whom she met through the Nightlight Christian Adoptions Agency in Oklahoma. *Id.* at 4a-5a. Birth Mother considered other families, including families residing in Oklahoma, but she ultimately selected petitioners "because they had values similar to her own and could provide Baby Girl a stable and loving home." *Id.* at 47a.

During the final months of the pregnancy, petitioners financially supported Birth Mother, spoke to her weekly, and traveled from South Carolina to Oklahoma to visit her. *Id.* at 5a. Adoptive Couple were in the delivery room when Birth Mother delivered Baby Girl, Adoptive Father cut the umbilical cord, and the couple cared for Baby Girl as their child from that moment forward, until they were ordered to transfer custody to Biological Father when Baby Girl was 27 months old. *Id.* at 7a, 11a.

The decision below effectively negated Birth Mother's decision to place Baby Girl with Adoptive Couple, and ripped Baby Girl from the only family she has ever known, in derogation of both Birth Mother's and Baby Girl's rights and expectations under state law. Birth Mother therefore has a substantial interest in the outcome of this case. Having voluntarily relinquished her own parental rights with the expectation that *petitioners* would care for and raise Baby Girl, consistent with Baby Girl's best interests and state law, Birth Mother is uniquely situated to speak to the profound effect of the decision below on the deeply personal, fundamental, and lawful choices made by child-bearing women.

SUMMARY OF ARGUMENT

This Court's intervention is urgently needed to resolve a well-developed, apparently intractable conflict on the meaning of a federal statute that decides the fate of some of the nation's most vulnerable children and has a profound effect on the women who bear them.

A woman who places her child for adoption and selects her child's adoptive parents makes a deeply personal decision that is fundamental to her identity as a birth mother. As this case powerfully illustrates, the broad interpretation adopted by the South Carolina Supreme Court and several other state courts of last resort operates to vitiate that choice—at all costs, in derogation of the rights and expectations provided under state law, and in near-complete disregard for the best interests of the children involved. That interpretation is both at odds with the text and purpose of the statute, and raises grave federalism concerns.

The tragic outcome in this case is unfortunately not aberrational, and the familiar fact pattern present here will arise with increasing frequency as the number of mixed-race children born to unwed parents continues to climb. Unless this Court reviews the decision below and gives guidance to state courts on the correct application of ICWA's provisions, birth mothers will continue to face intolerable uncertainty when making one of the most personal and important decisions in their lives—and established, thriving, family units will continue to be ripped apart.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI TO PROVIDE DEFINITIVE GUIDANCE IN THIS SENSITIVE AREA WHERE CONTINUED UNCERTAINTY IS INTOLERABLE

A. The Current Uncertainty Surrounding ICWA's Application Destroys Stable Family Units And Undermines The Deeply Personal Individual Choices of Birth Mothers

1. This Court has time and again acknowledged the "sanctity ... traditionally accorded to the relationships that develop within the unitary family." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989); *see also id.* at 124 (birth father's biological link to offspring does not rise to the level of a "protected family unit under the historic practices of our society"); *Troxel v. Granville*, 530 U.S. 57, 60 (2000) (plurality op.) (state law permitting "'any person'" to petition for visitation rights and authorizing the court to grant such rights whenever "'visitation may serve the best interest of the child,'" unconstitutionally interfered with

fundamental right of a mother to raise her children (quoting state law)); *Roberts v. United States Jaycees*, 468 U.S. 609, 618-20 (1984) (choices attending "the raising and education of children" must be protected against undue intrusion).

A birth mother who places her child for adoption and selects the adoptive parents makes a deeply personal decision that is fundamental to her identity as a birth mother. *See generally* Carol Sanger, *Placing the Adoptive Self, in Child, Family, and State* 58, 75-78 (Stephen Macedo & Iris Marion Young eds., 2003) (arguing that custodial authority of birth mother includes the right to choose adoptive parents). As most states recognize, the decision of a biological parent to choose permanent surrogate caretakers for her child is entitled to due respect, so long as it is consistent with the child's best interests. *See, e.g.*, Fla. Stat. § 63.082(6)(e) ("In determining whether the best interests of the child are served by transferring the custody of the minor child to the prospective adoptive parent selected by the parent, the court shall consider the rights of the parent to determine an appropriate placement for the child, the permanency offered, the child's bonding with any potential adoptive home that the child has been residing in, and the importance of maintaining sibling relationships, if possible."); Cal. Fam. Code § 8700(f) ("The relinquishing parent may name in the relinquishment the person or persons with whom he or she intends that placement of the child for adoption be made by the department, county adoption agency, or licensed adoption agency"); Vt. Stat. Ann. tit. 15A, § 2-406(b) ("A consent shall state that the parent or guardian executing the document is voluntarily and unequivocally consenting to the

transfer of legal and physical custody to, and the adoption of the minor by, a specific adoptive parent whom the parent or guardian has selected").

Recognizing the importance of this right, many of the nation's leading adoption agencies (including the many affiliates of Catholic Charities) assure women dealing with unplanned pregnancies that if they choose adoption, they will be able to select the family with whom their child will be placed. *See* Sanger, *supra*, at 77-78. Indeed, the evolution from "closed" to "open" adoptions—adoptions in which the adoptive family is chosen by, or at least known to, the birth mother—was grounded on a recognition that such openness is "central to sustaining adoption as a social institution." *Id.* at 81 & n.66.

2. When Birth Mother became pregnant, her relationship with Baby Girl's biological father quickly deteriorated. When pressed as to whether he would provide any emotional or financial support to her or the child, he informed Birth Mother via text message that he would rather surrender his parental rights. Pet. App. 4a. As a mother of two other children and a woman who barely made ends meet despite being gainfully employed, Birth Mother made the heartbreaking and selfless choice to give Baby Girl a better life than she could provide. *Id.*

Birth Mother took very seriously her responsibility—first to care for her unborn child, and then to secure for her a loving, stable home. She contacted the Nightlight Christian Adoptions Agency and, after pouring over numerous files of perspective adoptive parents and carefully examining their fitness and ability to provide a loving home to Baby Girl, she chose Adoptive Couple. *Id.* at 4a-5a. Adoptive Couple

were with her for every important stage of her pregnancy and during the delivery of Baby Girl. *Id.* at 5a-7a. From the moment Baby Girl breathed her first gasp of air, Adoptive Couple began caring for her as their own daughter, and Birth Mother felt secure in the knowledge that she had made a fully informed decision that she believed was in the best interest of her child—a decision that was hers to make under state law, as the sole custodian and only legal parent of Baby Girl. The South Carolina Supreme Court's expansive and counter-textual interpretation of ICWA entirely undermined that decision. *Id.* at 32a.

The tragic outcome in this case and countless others—a product of ancestral and geographical happenstance—is not only at odds with the plain language and purpose of ICWA, Pet. 22, 24-26, GAL Br. 8-9, but also has profoundly negative consequences for the families, including the birth mothers, involved. Unless this Court reviews the decision below and gives guidance to state courts on the correct application of ICWA's provisions, birth mothers will continue to face intolerable uncertainty when making one of the most personal and important decisions in their lives. *See* Solangel Maldonado, *Race, Culture, and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 Colum. J. Gender & L. 1, 42-43 (2008) (raising "constitutional questions concerning the reproductive freedoms of women carrying children of Indian descent" and suggesting that the current state of the law could "influence a woman's decision to terminate her pregnancy, place her child for adoption, or raise it herself").

Birth Mother might have taken a different path. She might have chosen, for example, to raise Baby Girl

herself—in near poverty, with little time or opportunity to attend to her needs, and while juggling work and responsibilities to her two other children as a single mother. Had she done so, the child's biological father, who had no parental rights under state law, would have had no right to intervene. Yet, the South Carolina Supreme Court's interpretation of ICWA negated Birth Mother's selection of Adoptive Couple—who, it is undisputed, were in all respects fit, loving, and committed parents to Baby Girl.

Moreover, if Birth Mother had had the means to fully investigate the state of the law, she could have insured against this outcome by choosing an adoptive couple that resides in Tennessee, or Kentucky, or any other state in which ICWA would not have applied to block Baby Girl's adoption. *See, e.g.*, *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990) (finding that ICWA does not apply to block the adoption because "since birth, [the child] has either resided with her non-Indian mother or her non-Indian great-aunt and great-uncle—except for a period of four weeks when she lived with her father and paternal grandmother" and therefore "was never a part of an Indian family environment"); *see also In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *4 (Tenn. Ct. App. Apr. 27, 2009) (finding "that the Existing Indian Family Doctrine is recognized in Tennessee").

Of course, because the very slightest trace of Cherokee heritage will suffice to expose a child to classification as an "Indian child," many cases will arise in which the unwed birth mother with sole custody may have no idea that her placement of her child could be vitiated at the tribe's election—until it is too late to do

anything about it.[2] In either scenario, the current incentives for forum shopping, and the grave uncertainty about ICWA's application, have persisted for far too long. *See* Maldonado, *supra*, at 36, 35 (noting that "[t]he risk, or even mere perception, that adoptions of Indian children are more likely to be disrupted might dissuade some non-Indian families from adopting Indian children, even when there are no Indian families available to adopt those children"; and that adoption agencies may be "hesitant to accept a ... child of Native American descent").

B. The Questions Presented Arise With Increasing Frequency

More than twenty state courts are openly and intractably divided as to whether ICWA's "parental termination" provision applies at all to the "'familiar fact pattern'" presented in this case: "the voluntary relinquishment of an illegitimate Indian child by its non-Indian mother." Pet. 11 (citation omitted); *S.A. v. E.J.P.*, 571 So. 2d at 1189. That "familiar fact pattern" continues to arise with increasing frequency.

According to the 2010 United States Census, approximately 5.2 million Americans self-identify as having some Indian heritage. Tina Norris et al., U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010*, at 1 (2012), *available at*

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[2] The Cherokee Nation has no "blood quantum" requirement for membership, provided the person can trace their descent—however remote—to the original enrollees in the Dawes Commission Rolls of 1867. Cherokee Nation Const. art. IV, § 1, *available at* http://www.cherokee.org/Docs/Org2010/2011/4/308011999-2003-CN-CONSTITUTION.pdf.

http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf. By contrast, at the time of ICWA's enactment, that number was only 1.4 million. *See* Comm. on Population, Nat'l Research Council, *Changing Numbers, Changing Needs: American Indian Demography and Public Health* 82 (Gary D. Sandefur, Ronald R. Rindfuss & Barney Cohen eds., 1996). Whether this increase is due to actual population growth, the decreased quantum of Native American heritage required to claim tribal membership, or higher rates of self-identification (due to the recent success of tribal gaming, for example), the result is the same—an increasing number of children are swept within the definition of "Indian child" in 25 U.S.C. § 1903(4).

As the number of Americans who self-identify as Native American has increased, so too has the percentage of Native Americans residing off-reservation. In 1950, only 13 percent of American Indians resided in cities; by 1990, 56 percent of the total national Indian population lived in urban areas. Alvin M. Josephy et al., *Red Power: The American Indians' Fight for Freedom* 260 (1999). That number has only continued to grow in recent years. *See* U.S. Census Bureau, *Tribal Governments Liaison Program: Handbook for Tribes and Urban American Indian and Alaska Native Populations* 1 (2009), *available at* http://www.census.gov/aian/pdf/TGLH_43009.pdf ("The 2000 Census revealed that approximately 60-64% of the AIAN population resided in urban communities living off-reservation or outside tribal jurisdictional boundaries."); Norris, *supra*, at 12-13 ("In 2010, the majority of the American Indian and Alaska Native alone-or-in-combination population (78 percent) lived outside of American Indian and Alaska Native areas.").

And Native American children living in urban areas, in particular, are more likely to have parents of mixed race and are therefore more likely to be negatively affected by state courts' erroneous applications of ICWA. *See* Jill E. Tompkins, *Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions*, 81 U. Colo. L. Rev. 1119, 1132 (2010) ("Given the relative size of the Indian population in relation to other groups in urban areas, the overwhelming percentage of potential marriage partners and co-parents are non-Indian.").

In the three-plus decades since ICWA's enactment, "the child-welfare landscape of the United States as a whole has also significantly changed." *Id.* Due to a variety of factors, an increasing number of American children are in need of placement, and children of Native American descent account for a disproportionately high percentage of these children. *See* Alfred Perez, Kasia O'Neil & Sarah Gesiriech, *Demographics of Children in Foster Care* 2 & fig. 2 (2003), *available at* http://www.unified-solutions.org/Pubs/demographics_of_children_in_foster_care.pdf. As of September 2011, there were 8,020 Alaskan Native or American Indian children in publicly supported foster care. Children's Bureau, U.S. Dep't of Health & Human Servs., The AFCARS Report (Preliminary FY 2011 Estimates as of July 2012), No. 19, at 2, *available at* http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf (last visited Oct. 29, 2012).

The combination of these trends suggests that the "familiar fact pattern" presented in this case will continue to arise with increasing frequency. Courts and academics alike have long urged this Court to

intervene to provide guidance on the application of ICWA in the familiar fact pattern presented here.[3] Further percolation is neither warranted nor wise, in light of the high stakes involved for these children and their families.

C. The South Carolina Supreme Court's Interpretation Raises Grave Federalism Concerns

As explained in the petition for certiorari and in the brief submitted by Respondent Guardian ad Litem of Baby Girl, the South Carolina Supreme Court's interpretation of ICWA is contrary to its text and purpose, and raises grave constitutional concerns, not the least of which goes to the proper balance of the federal and state spheres. Jurisdiction over matters of family relations is traditionally reserved to the States.

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[3] *See, e.g.*, Maldonado, *supra*, at 43 (suggesting that "the time has come" for the Supreme Court to review ICWA's application); *see also State ex rel. C.D. v. State*, 200 P.3d 194, 197 (Utah Ct. App. 2008) (noting that, since ICWA's adoption, "courts have struggled to apply it, often reaching inconsistent conclusions about the meaning of various terms" without meaningful guidance from this Court); *State ex rel. D.A.C. v. P.D.C.*, 933 P.2d 993, 998 (Utah Ct. App. 1997) ("sister states are significantly split"); *In re Adoption of S.S.*, 622 N.E.2d 832, 834 (Ill. App. Ct. 1993) (noting that courts across the country are "sharply divided as to the propriety of" applying ICWA to the recurring fact pattern of adoptions voluntarily initiated by non-Indian mothers), *rev'd*, 657 N.E.2d 935 (Ill. 1995); *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 683 (Ct. App. 1996) ("There is a split on this issue, both nationally and in California."); *In re Baby Boy L.*, 103 P.3d 1099, 1106 n.21 (Okla. 2004) (noting that "the United States Supreme Court has yet to decide the issue" despite the fact that "a split of authority exists"); *In re A.J.S.*, 204 P.3d [illegible] (Kan. 2009) (observing that "the United States Supreme Court has not addressed the issue before us").

See, e.g., Rose v. Rose, 481 U.S. 619, 625 (1987); *Lehman v. Lycoming Cnty. Children's Servs.*, 458 U.S. 502, 511-12 (1982); *In re Burrus*, 136 U.S. 586, 593-94 (1890). Thus, where it is contended that a federal law must override state law on a matter relating to family relations, it must be shown that application of the state law in question would do "'major damage' to 'clear and substantial federal interests.'" *Rose*, 481 U.S. at 625 (citation omitted).

Interpreting ICWA to vitiate a birth mother's lawful placement of her child consistent with the child's best interests—and to *create* parental rights in a biological father where there are none under state law—invades a State's prerogative to enforce its domestic relations laws. Whatever federal interest there might be in this context—where an unwed biological father of a child who is $^{1}/_{16}$ Cherokee, living off reservation, never had or sought custody and affirmatively renounced any parent-child relationship—it is not sufficient to justify displacement of a State's domestic relations laws, even if the ICWA could otherwise be read that broadly. *See In re Adoption of T.R.M.*, 525 N.E.2d 298, 304 n.1 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989) (noting that "'the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power'" and observing that "the Supreme Court has not yet addressed the constitutionality of the ICWA under the Tenth Amendment or general principles of federalism" (citation omitted)); *see also* H.R. Rep. No. 95-1386, at 12, 40 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7534, 7563 (DOJ expressing concern that ICWA might

violate the Tenth Amendment as applied to off-reservation custody disputes.).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-399

OCT 3 1 2012

In The

Supreme Court of the United States

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ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, a minor under the age of fourteen years, BIRTH FATHER, and THE CHEROKEE NATION,

Respondents.

On Petition For A Writ Of Certiorari To The South Carolina Supreme Court

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE COUNTY WELFARE DIRECTORS ASSOCIATION OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE COUNTY WELFARE DIRECTORS ASSOCIATION OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS[1]

The California State Association of Counties ("CSAC") and the County Welfare Directors Association of California ("CWDA") submit this brief in support of petitioners.

The *amici* have an interest in this case because the decision of the South Carolina Supreme Court creates conflicts in case law defining the federal rights of an unwed father under the Indian Child Welfare Act (ICWA). By deepening the existing conflict in the courts, the decision increases the difficulty for the *amici* to discharge their responsibility for protecting children in California.

Petitioners identified two issues pertinent to voluntary adoptions that have sharply divided state courts. Pet. 11-21. The issues presented in this case, however, overlap into the area of involuntary child custody proceedings, and the *amici* write separately

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici*, its counsel or its members made any monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel of record provided the required notice to the parties at least ten days before the filing deadline for this brief.

to focus on the constitutional and statutory rights of children in that context.

INTERESTS OF THE *AMICI CURIAE*

CSAC is a nonprofit corporation, the membership of which consists of the 58 California counties. CSAC sponsors a Litigation Coordination Committee, which is administered by the County Counsels' Association of California. CSAC is overseen by the Association's Litigation Overview Committee. The committee, which is comprised of county counsels throughout the state, monitors litigation of concern to counties statewide. Because the committee determined that this case involves issues affecting all California counties, the committee voted *unanimously* to provide *amicus* support to petitioners.

CWDA is a nonprofit association representing the human service directors from each of California's 58 counties. The Association's mission is to promote a human services system that encourages self-sufficiency of families and communities, and protects vulnerable children and adults from abuse and neglect. CWDA represents the county agencies that administer the child welfare and foster care programs on behalf of the State and are thus directly impacted by this case.

CSAC's representation includes agencies in California charged with the protection of children who are dependents of the juvenile court in their

respective counties; and CWDA's mission is to protect children from abuse and neglect.

This case has special interest to the *amici* because California has the largest population of Native American Indians in the United States.[2] California also has a high number of juvenile dependency appeals involving ICWA compliance issues.[3] Furthermore, there is a large population of children in California who are living in foster care.[4]

Due to California's demographics, the *amici's* responsibility for protecting juvenile dependent children with Indian ancestry has become increasingly challenging. The responsibility has also become unnecessarily difficult due to confusion created by conflicting judicial interpretations of the ICWA requirements.

This case has added confusion to the implementation of an area of the law with widespread interest.

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[2] According to the 2010 Census, California had the largest percentage (14 percent), followed by Oklahoma. U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010*, p. 6, 2010 Census Briefs, http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf (last visited Oct. 21, 2012).

[3] A Westlaw search in the California database, conducted on October 21, 2012, yielded 2441 documents using the following query: "Indian Child Welfare Act." Another search yielded 1419 documents by including "+ reversed" to the aforementioned query.

[4] In July 2009, approximately 53,000 children in California were living in foster care under the supervision of child welfare departments. *In re W.B., Jr.*, 281 P.3d 906, 913 n.4 (Cal. 2012).

Although the South Carolina decision concerns a *voluntary* adoption proceeding, the questions presented are vital in *every* proceeding involving dependent children in the juvenile court system, initiated by child protection agencies throughout California. These cases include *involuntary* termination of parental rights proceedings.

Because juvenile court dependency cases often involve interstate transfers, the South Carolina Supreme Court's decision increases the *amici's* difficulties to discharge their responsibility for protecting children in California. Confusion regarding compliance with the ICWA has delayed permanency for children, taxed limited resources, and created a proliferation of appeals involving children with Native American Indian ancestry. By preventing them from achieving permanency in the least protracted fashion possible, such delays are harmful to young children. Thus, there is an immediate need for this Court to grant review to establish a uniform standard for deciding the threshold ICWA issues presented in the petition for certiorari.

This case is an ideal vehicle for resolving questions that involve important rights. The South Carolina Supreme Court's decision presents two clearly defined issues of widespread importance: (1) Whether a *non*-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law; and (2) Whether ICWA defines "parent" in 25 U.S.C. section 1903(9) to include an unwed biological father who has not complied with

state law rules to attain legal status as a parent. For these reasons, this case is important to the *amici*.[5]

SUMMARY OF ARGUMENT

Compliance with ICWA's requirements has confounded courts throughout the country for over thirty years. Thus, the *amici* agree with the arguments presented in the petition for writ of certiorari. More specifically, the *amici* agree with petitioners' claim that review should be granted because the South Carolina Supreme Court's decision presents two clearly defined legal issues of widespread importance that have divided the state courts. Furthermore, for the reasons stated in the petition, the *amici* agree that the decision was wrongly decided.

The South Carolina Supreme Court erred in two respects: (1) by holding that a *non*-custodial parent can invoke ICWA to block a voluntary adoption; and (2) by holding that a "parent," as defined in 25 U.S.C. section 1903(9), includes an unwed biological father who has not complied with state law rules to attain legal status as a parent.

The South Carolina Supreme Court allowed the biological father to invoke the heightened evidentiary standards pursuant to 25 U.S.C. section 1912(f) – which apply to parental termination proceedings

[5] *See* n.3, *ante*.

involving an Indian child – and held that he had standing to contest the adoption. As such, even though he failed to assume parental responsibilities for his child and instead, abandoned the child, he received rights otherwise denied to similarly situated, non-Indian biological fathers.

In short, by overlooking the fact that the biological father would not have met the qualifications for acknowledging or establishing paternity under South Carolina law, the South Carolina Supreme Court impermissibly created a new federal class of "parents" based on race and genetics. But for the court's novel approach, the heightened evidentiary standards – applicable only to cases involving adoption of Indian children removed from a *custodial* parent – would not have been triggered; and the biological father would not have been provided a second chance to establish parental status.

A biological father's status as a parent affects all adoptions – including those following the involuntary termination of parental rights pursuant to proceedings initiated by child protection agencies. Because the questions in this case arose in the context of a family court proceeding, petitioners understandably focus on whether the unwed biological father was a parent for purposes of determining whether his consent was required for a voluntary adoption. The *amici* address the rights of children to emphasize the need for a uniform approach for applying ICWA requirements in a manner that best serves the interests of Indian children.

Guidance from this Court is needed to settle the deepening conflicts created by the South Carolina Supreme Court decision. Confusion in the law invites litigation and impedes the ability of courts and social service agencies to promote laudable Congressional goals: preserving Indian culture and protecting the stability of Indian tribes and Indian children.

REASONS FOR GRANTING THE WRIT

I. The South Carolina Supreme Court erroneously expanded the definition of a "parent" under the ICWA, deepening the existing conflict with decisions of other states.

Petitioners have identified two entrenched splits among state courts concerning the application of ICWA. Pet. 11-17. The South Carolina Supreme Court's erroneous expansion of the definition of a "parent" under ICWA 25 U.S.C. section 1903(9) creates a conflict with decisions of other states, including California. The decision's holding that 25 U.S.C. section 1912(f) may be invoked by a *non*-custodial parent also deepens the existing divide. Furthermore, the decision is inconsistent with 25 U.S.C. section 1914, which provides standing to a parent "from whose custody . . . a child was removed."

The South Carolina Supreme Court found irrelevant that father was not a "parent" under state law. While acknowledging that the unwed biological father would not have qualified as a parent under state law

(App. 21a-22a n.19), the majority held that the consideration was irrelevant under ICWA – reaching to allow father to invoke the special parental termination provision pursuant to 25 U.S.C. section 1912(f), which is applicable only to "parents" of Indian children. App. 32a n.26; *accord*, App. 58a (Kittredge, J., dissenting).

In addition to the cases cited in the petition, the South Carolina Supreme Court's decision creates a conflict with California case law. For example, the California Supreme Court has held that to attain full statutory rights as a parent in a proceeding, the biological father must attain presumed father status (*In re Zacharia D.*, 862 P.2d 751, 762 (Cal. 1993) or demonstrate he is entitled to the same rights as a presumed father under the case of *Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992).

The California Supreme Court has also held that a father has no federal constitutional rights, under either the Equal Protection or Due Process Clauses of the United States Constitution, to withhold consent to an adoption of his child where he fails to demonstrate a prompt and full commitment to parenthood, especially within a short time after he discovered or reasonably should have discovered that the mother was pregnant with his child. *See In re Adoption of Michael H.*, 898 P.2d 891, 901, reh'g denied, Sept. 28, 1995 and cert. denied, 516 U.S. 1176, 116 S. Ct. 1272, 134 L. Ed. 2d 219 (1996). Nothing in ICWA demonstrates Congressional intent to abandon this federal standard.

Citing 25 U.S.C. section 1903(9), a California appellate court explained: "The ICWA defines 'parent' as 'any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child. . . . ' [Citation.] The ICWA expressly excludes from the definition of 'parent' an 'unwed father where paternity has not been acknowledged or established.'" *In re Daniel M.*, 1 Cal. Rptr. 3d 897, 899 (Cal. Ct. App. 2003) "[B]ecause the ICWA does not provide a standard for the acknowledgment or establishment of paternity, courts have resolved the issue under state law. [Citations.] Courts have held an unwed father must take some official action, such as filing a voluntary declaration of paternity, establishing paternity in legal proceedings, or petitioning to have his name placed on the child's birth certificate. [Citations.]" *Ibid.*

It is, thus, well-settled in California that an unwed biological father would not be accorded standing under the facts of this case, where the biological father had abandoned Baby Girl and did not have custody of the child. *See In re Ariel H.*, 86 Cal. Rptr. 2d 125 (Cal. Ct. App. 1999).

In *Ariel H., supra,* the prospective adoptive parents brought a petition to determine whether [the] unwed fifteen-year old biological father's consent was required for adoption. *Ariel H., supra,* 86 Cal. Rptr. 2d 125. Even though the biological father avoided making even minimal efforts to assume responsibilities until after the child was born, when his parents were served with adoption papers, he

sought to prevent the adoption by filing a complaint to establish parental rights and obtain custody. *Id.* at 126.

During the proceedings below, the biological father in *Ariel H., supra,* presented no evidence that he was entitled to presumed father status under California Family Code section 7611, subdivision (d). *Ariel H., supra,* 86 Cal. Rptr. 2d at 127-128. Thus, the trial court terminated his parental rights, after determining that he was not the presumed father and his consent to the action was unnecessary. *Id.* at 26.

Even though he never saw the child nor did he publicly acknowledge his paternity, the biological father in *Ariel H., supra*, appealed. *Ariel H., supra,* 86 Cal. Rptr. 2d at 126. On appeal, he tried to excuse his inaction by citing his own minority, an argument which the appellate court rejected. *Id.* at 128. The appellate court affirmed. *Id.* at 128.

The *amici* concur with petitioners' view that an unwed biological father must establish paternity under state law to have standing as a "parent" under ICWA to obstruct a voluntary adoption.[6] The South

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[6] As stated in the petition, "Congress . . . intended that parenthood for unwed fathers would be limited to those who showed the requisite support under state law." *See* Pet. 22 (further noting that "ICWA does not set forth any procedures by which an unwed father must sufficiently 'acknowledge' or 'establish' paternity to present his parental rights"); *see also* Pet. 21 (The ICWA definition of "a parent" found in 25 U.S.C. section 1903(9) should be read as "incorporating a state's definition of

(Continued on following page)

Carolina Supreme Court's decision incorrectly decided that a different standard applies to an unwed biological father who has Native American Indian ancestry.

Furthermore, the *amici* concur with petitioners' view that even assuming the biological father was a "parent" under the ICWA, the majority "separately erred in holding that ICWA's parental termination provision 25 U.S.C. § 1912(f)" may be invoked by "a *non*-custodial parent." Pet. 25. *Cf. In the Matter of S.C. and J.C., Minors,* 833 P.2d 1249 (Okla. 1992), overruled by statute as stated in *Leatherman v. Yancey* (*In re Baby Boy L.*), 103 P.3d 1099 (Okla. 2004) (After non-Indian mother's parental rights in children were terminated, Indian father filed motion to invalidate foster care based on alleged violation of the ICWA. The trial court refused to invalidate the foster placement, and father appealed. The Court of Appeals affirmed. The Supreme Court granted certiorari and held that ICWA does not permit noncustodial Indian parent to invalidate state court ruling on foster care placement.). First, as petitioners explained, the majority failed to consider equal protection principles implicated by its grant of preferential custodial rights to a *non*-custodial father based on his Native American Indian ancestry. *See* Pet. 26-27 (noting that the relevance of the "Existing Indian Family" doctrine ("EIF") in saving ICWA from constitutional

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parenthood for unwed biological fathers."). The *amici* also concur with petitioners' view that whether father is a "parent" is the "threshold question." Pet. 21; *see also* Pet. 21-24.

infirmity). Second, acknowledging a long-established split in the state courts of last resort on the applicability of the EIF, in a footnote, the majority summarily rejected the doctrine. App. 17a-18a n.17.

As petitioners noted, "ICWA . . . represents a rare entry by the federal government into substantive family law, which has long been the exclusive domain of state law." Pet. 4. The South Carolina Supreme Court misinterpreted that entrée as an authorization to re-define who is a "parent" for purposes of family court, juvenile court, and other state court proceedings involving child custody.

Mere biology is insufficient to confer rights to an unwed father who has not acknowledged or established paternity by assuming a parental role. In *Lehr v. Robertson*, 463 U.S. 248 (1983), cited by petitioners, this Court held that failure to give putative father notice of adoption proceedings did not violate due process where he had never established a substantial relationship with his child. *Lehr v. Robertson*, 463 U.S. 248, 260.

The ICWA defines "parent" as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom." (25 U.S.C. § 1903(9).) The ICWA expressly excludes from the definition of "parent" an "unwed father where paternity has not been acknowledged or established." *Ibid.* Congress included the exception in the definition of "parent" to exclude biological fathers, such as

the one in the present case, who evaded involvement before and during the mother's pregnancy, and who abandoned his parental responsibilities.

A different definition of a "parent" should not be established for an unwed, biological father merely because he has Native American Indian ancestry. Had Congress meant to extend federal rights to *all* biological parents of an Indian child, "'it knew how to use express language to that effect.'" *Williams v. Florida*, 399 U.S. 78, 97 (1970).

II. The questions presented in this case have widespread importance to individuals, as well as to social service agencies responsible for the protection of children.

For the reasons set forth in the petition, the *amici* agree with their position that the South Carolina Supreme Court's interpretation of the ICWA was wrong. *See* Pet. 21-27. In the *amici's* view, the petition for writ of certiorari should be granted to allow this Court to review the decision, which impedes rather than elucidates proper application of the ICWA. Even more troubling, by creating additional confusion, the case will further delay permanency for children while legal practitioners and lower courts struggle to apply or distinguish it.

In this case, *had* the trial court found that the biological father was not a "parent," the proceeding for adoption would have been voluntary as to the birth mother; and as such, the tribe would not have

been entitled to notice and intervention pursuant to 25 U.S.C. section 1912.

An erroneous paternity determination has far-reaching effects because states must give full faith and credit to paternity determinations by sister states. (*See, e.g.*, 42 U.S.C. § 666(a)(5)(C)(iv).) Since juvenile dependency cases often involve inter-state transfers, the *Amici* have a special interest in this case. *See, e.g., In re Mary G.*, 59 Cal. Rptr. 3d 703, 723 (Cal. Ct. App. 2007) (citing U.S.C.A. Const. Art. 4, section 1, the court reversed, holding that paternity affidavit signed by father in another state, which had the same force and effect as a judgment in that state, was entitled to full faith and credit in California pursuant to the Constitution's Full Faith and Credit Clause, as well as California Family Code section 5604 providing that out-of-state paternity declarations have the same effect as a paternity declaration in California; thus, out-of-state paternity acknowledgement qualified father for presumed father status in California and reunification services as a matter of right).

Review is urgent. As one of the dissenting justices noted, "almost forty years [following the enactment of ICWA], in struggling with the human reality of implementing ICWA, courts frequently face competing tensions. . . ." Pet. App. 54a (Kittredge, J., dissenting). "Despite . . . conflicts among the states, there have been no amendments to the ICWA. In addition, the United States Supreme Court has issued only one decision interpreting the ICWA in the [nearly forty]

years since it became effective." *State ex rel. C.D.*, 200 P.3d 194, 197 (Utah Ct. App. 2008), citing *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

III. The South Carolina Supreme Court's decision overrides consideration of a child's best interests in custody determinations involving children with Native American Indian ancestry.

Having erroneously concluded that the biological father had standing to block the adoption because he had Indian ancestry, the South Carolina Supreme Court erred again by concluding that application of ICWA ipso facto trumps the best interests of the child. Thus, review is also needed to establish a national standard to provide guidance to social service agencies, legal practitioners, and the courts construing ICWA's definitions and requirements.

The United States Supreme Court has issued several opinions establishing that children have constitutionally protected rights. *See, e.g., Roberts v. United States Jaycees,* 468 U.S. 609, 617-618 (1991) ("certain intimate human relationships" must be "secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme"; and among these "intimate human relationships" is the creation and sustenance of a family" (*id.* at 617-619); and accordingly, these relationships are granted "a substantial measure of

sanctuary from unjustified interference by the State." *Id.* at 618); *see also In re Gault,* 387 U.S. 1, 13 (1967); *Troxel v. Granville,* 530 U.S. 57, 89, n.8 (2000) (dis. opn. of Stevens, J.).[7]

Even if children did not have constitutional rights, California courts have held that application of the EIF is necessary to limit ICWA to avoid constitutional flaws. (*See, e.g., In re Bridget R.*, 49 Cal. Rptr. 2d 507, 516 (Cal. Ct. App. 1996); *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 686 (Cal. Ct. App. 1996); *In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715 (Cal. Ct. App. 2001).

Without regard to the question of whether the biological father was an Indian "parent," by focusing exclusively on his rights as an Indian, the majority's erroneous interpretation and application of the ICWA rendered Baby Girl's best interest wholly irrelevant to the case. *See* Pet. App. 54a-55a (Kittredge, J., dissenting) (criticizing "the majority's approach of

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[7] While the United States Supreme Court has reserved the issue of deciding the nature of a child's liberty interests in preserving established familial or family-like bonds (*Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989)), the California Supreme Court has declared that "[c]hildren . . . have fundamental rights – including the fundamental right . . to 'have a placement that is stable, [and] permanent.'" *In re Jasmon O.*, 8 Cal. 4th 398, 419 (Cal. 1994) (recognizing that "children are not simply chattels belonging to their parent, but have fundamental interests of their own"); *see also In re Bridget R., supra*, 49 Cal. Rptr. 2d at 1490 (children's interests are of constitutional dimension)).

applying ICWA in a rigid, formulaic manner without regard to the facts of the particular cases and the best interests of the Indian child"); *see also id.* at 70a (Kittredge, J., dissenting) n.56 ("It is clear to me from the totality of the majority's analysis that its application of ICWA has eviscerated any meaningful consideration of Baby Girl's best interests, despite its lip service to this settled principle.").

Although Justice Kittredge did not consider "the portions of the Guardian *ad Litem's* report going to the ultimate issues to be decided," the Justice nonetheless made his own, "separate[ ] and independent[ ]" findings of Baby Girl's best interest. *Id.* at 51a, n.44.

The majority acknowledged that if the ICWA does not apply, then the biological father's abandonment of Baby Girl extinguished his standing to contest the adoption. Pet. App. 21a n.19, 24a. Notwithstanding its recognition that South Carolina state law would not even recognize the biological father as a parent with standing to challenge the adoption, the majority invoked the ICWA's special parental termination provision for "Indian parents" to give him standing. *Id.* at 21a-22a. As Justice Kittredge noted in his dissenting opinion, "the decision of the family court judge was influenced to some extent by the erroneous legal conclusion that ICWA eclipses the family court's obligation to determine what would be in the child's best interests." Pet. App. 70a (Kittredge, J., dissenting).

In the absence of any other decision in which this Court has construed the requirements of ICWA, the majority turned to *Holyfield, supra*, 490 U.S. 30. That case did not involve a voluntary adoption proceeding, and the case addressed an entirely separate provision of ICWA than at issue here. *See Holyfield*, 490 U.S. at 36 (addressing 25 U.S.C. section 1911(a) and its application to tribal jurisdiction over child custody proceedings involving Indian children domiciled on tribal land). The majority in the present case nonetheless misconstrued the narrow holding in *Holyfield* by "conflat[ing] the . . . controlling feature of substantive law regarding the protection of an Indian child's best interests to justify its rigid view of ICWA's exclusive dominance in every realm. . . ." Pet. App. 61a-62a n.48 (Kittredge, J., dissenting) ("Unlike the majority, my view is predicated upon the guiding principle that '[t]he welfare and best interests of the child are paramount in custody disputes.' [Citations.] Thus, 'ICWA's applicability does not mean that ICWA *replaces* state law with regard to a child's best interests.' [Citations.]" (emphasis added by Kittredge, J.).

Furthermore, as Justice Kittredge noted, the majority also "misapprehend[ed]" *Holyfield* by finding that the case supports the majority's interpretation that "it would be inappropriate to consider the bonding that occurred between Baby Girl and [Petitioners]

during litigation." Pet. App. 81a, n.62 (Kittredge, J., dissenting).[8]

The majority's holding regarding active efforts – that such efforts must be provided even when a parent unilaterally abandons his rights and responsibilities – is inconsistent with fundamental federal and state law, which recognizes the principle that the law does not require idle acts. *See, e.g., Vigil v. Tansy,* 917 F.2d 1277, 1279 (10th Cir. 1990); *Weaver v. Ewers,* 195 F. 247, 249 (8th Cir. 1912); *Letitia V. v. Superior Court,* 97 Cal. Rptr. 2d 303 (Cal. Ct. App. 2000.)

The South Carolina Supreme Court's approach to ICWA analysis is inconsistent with California case law. When the California court of appeal considered a similar issue in *In re William G.*, 107 Cal. Rptr. 2d 436 (Cal. Ct. App. 2001), the court held that ICWA does not require the performance of unreasonable or impossible services to maintain the family. *Id.* at p. 439 ("The Act requires that active efforts be made to provide services, not that services be provided

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[8] *Cf.* In *Holyfield, supra*, 490 U.S. 30, the United States Supreme Court acknowledged the effects of the passage of time on the lives of young children:

> We are not unaware that over three years have passed since the twin babies were born and placed in the Holyfield home, and that a court deciding their fate today is not writing on a blank slate in the same way it would have in January 1986. Three years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain. (*Holyfield, supra*, 490 U.S. at 53.).

regardless of when a parent becomes available to receive those services."); *see also In re Hannah S.*, 13 Cal. Rptr. 3d 338, 612 (Cal. Ct. App. 2004) (finding party seeking termination of parental rights was not required to make active efforts based on father's abandonment and felony convictions resulting in a prison term.) Review would settle this confusion by providing this Court the opportunity to address either of the issues raised in the petition.

Furthermore, the South Carolina Supreme Court decision overlooks an important Congressional goal, which this Court long ago recognized: ICWA was enacted for the purpose of preventing "harm to Indian parents and their children who were *involuntarily* separated by decisions of local welfare authorities." *Holyfield*, *supra*, 490 U.S. at 34 (emphasis added). Even though this case did not involve an involuntary separation, or a decision by a governmental agency, without addressing whether Baby Girl's interests would be best served through adoption by the only caregivers she has ever known, the majority summarily concluded: "ICWA presumes that placement within its ambit is in the Indian child's best interests." Pet. App. 39a. The decision conflicts with well-settled case law that recognizes a child's compelling right to permanence and stability.

Review is urgent because litigation attempting to either apply or distinguish the South Carolina decision – and to apply or distinguish the dozens of conflicting state court decisions on the questions presented – will further compromise permanency and

stability for children. Unless review is granted, conflicts in the law regarding a biological father's standing in a voluntary adoption proceeding will remain unresolved. More important, as relevant to *every* child custody adoption proceeding – including involuntary adoption proceedings initiated by child protection agencies throughout the country – the approach by the majority raises a question of national importance: Did Congress intend the ICWA to be applied in derogation of the child's best interests and welfare? Without a uniform standard, the implementation of the laudable goals of the ICWA will continue to confound social service agencies, legal practitioners, and the courts.

CONCLUSION

For the reasons set forth by the petition, and for the additional reasons stated in this brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 31, 2012

AMICUS CURIAE BRIEF

MOTION FILED
OCT 31 2012

No. 12-399

IN THE
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF PROFESSOR JOAN HEIFETZ HOLLINGER, CENTER FOR ADOPTION POLICY, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AND ADVOKIDS AS AMICI CURIAE IN SUPPORT OF RESPONDENT BABY GIRL

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IN THE

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ADOPTIVE COUPLE,

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v.

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Respondents.

MOTION OF JOAN HEIFETZ HOLLINGER, CENTER FOR ADOPTION POLICY, NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN, AND ADVOKIDS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Professor Joan Heifetz Hollinger, the Center for Adoption Policy, the National Association of Counsel for Children, and Advokids hereby seek leave, pursuant to this Court's Rule 37.2, to file the attached brief as *amici curiae* in support of Respondent Baby Girl.

Petitioners and Respondent Baby Girl, by her guardian *ad litem*, have consented to the filing of this brief. Respondents Birth Father and the Cherokee Nation have consented to the filing of this brief so long as it is submitted in support of Petitioners, rather than in support of Respondent Baby Girl. Respondents Birth Father and the Cherokee Nation have refused to consent to the filing of this brief in support of Respondent Baby Girl

because, in their view, the guardian *ad litem* is "not empowered to act on Baby Girl's behalf at this time." Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

Amici have substantial knowledge of, and experience dealing with, the adoption and child custody issues presented in this case. They have advocated on behalf of children in custody and adoption proceedings, engaged in the development and drafting of legislation and standards governing adoption, authored authoritative works on adoption law and practice, and provided research, analysis, advice, and education to practitioners and the public about current legislation and practices governing adoptions. They have also participated as *amicus curiae* in numerous state and federal cases where children's rights were at issue. Their expertise in the field of family law and adoption proceedings will assist the Court in evaluating the importance of the issues presented in this case.

Respondents Birth Father and the Cherokee Nation oppose the filing of the brief only insofar as it is submitted in support of Respondent Baby Girl, and not in support of Petitioners. *Amici* seek leave to file this brief in support of Respondent Baby Girl because resolution of the questions presented is in the best interest of both Respondent Baby Girl and other similarly situated children nationwide. *Amici* have not submitted the brief in support of Petitioners because they prefer not to choose sides in the custody dispute between Petitioners and Respondents Birth Father and the Cherokee Nation.

The reason given by Respondents Birth Father and the Cherokee Nation for denying consent—that

the guardian *ad litem* is no longer empowered to act on behalf of Respondent Baby Girl—provides no basis for denying *amici*'s motion for leave to file a brief. There can be no dispute that Baby Girl is a Respondent in this Court given that she was a party before the Supreme Court of South Carolina. *See* S. Ct. R. 12.6. Under this Court's rules, *amici*'s ability to file a brief on behalf of Respondent Baby Girl is not dependent upon the guardian *ad litem*'s authority. As a result, regardless of whether the guardian *ad litem* is empowered to act, *amici* should be permitted to file a brief in support of Respondent Baby Girl.

For the foregoing reasons, Professor Joan Heifetz Hollinger, the Center for Adoption Policy, the National Association of Counsel for Children, and Advokids should be granted leave to file the attached brief.

Respectfully submitted,

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Uniform Parentage Act 14

INTEREST OF AMICI CURIAE

Amici are a law professor and three non-profit organizations with substantial knowledge of, and experience dealing with, the adoption and child custody issues presented in this case.[1]

Professor Joan Heifetz Hollinger is a leading American scholar on adoption law and policy. As a faculty member at the University of California, Berkeley Law School since 1993, and before that, as a Professor of Law at the University of Detroit, she has been devoted to research, teaching, and advocacy on family law issues, especially as they affect the welfare of children. She is the editor and principal author of the standard national treatise *Adoption Law and Practice* 3 vols. (Lexis\Matthew Bender Co. 1988, Supp 2012), co-editor of *Families By Law: An Adoption Reader* (NYU Press, 2004), and the author of numerous articles and conference papers, including *Interstate Jurisdiction and Choice of Law Issues in Adoption and Other Parentage Proceedings* (PLI 2010). She is the Reporter for the proposed Uniform Adoption Act, helped draft the revised Uniform Parentage Act of 2002, is an Honorary

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored the brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici* or their counsel made such a monetary contribution. Because the parties have not consented to the filing of this brief, *amici* have filed a motion for leave to file the brief. The parties' correspondence has been lodged with the Clerk.

Member of many child advocacy organizations, wrote the federal *Guide to the Multiethnic Placement Act* (1998), and is at the forefront of efforts to improve the Hague Convention on Intercountry Adoption. She has appeared as *amicus curiae* on behalf of children in a number of high-profile adoption, assisted reproduction, parentage and custody cases in state and federal courts that have recognized children's legal ties to their actual parents, whether biological or non-biological.

The Center for Adoption Policy (CAP) is a New York based non-profit organization. Its mission is to provide research, analysis, advice, and education to practitioners and the public about current legislation and practices governing ethical domestic and intercountry adoption in the United States, Europe, Asia, Latin America, and Africa. CAP is an independent entity. It is not affiliated with any agency or entity involved in the placement of children.

Founded in 1977, the National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. The organization is multidisciplinary and has approximately 1800 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance

the rights and interests of children. NACC programs serving these goals include training and technical assistance, the national children's law resource center, the child welfare attorney specialty certification program, policy advocacy, and the *amicus curiae* program. Through its *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and in the Supreme Court of the United States.

Advokids is a non-profit organization that advocates on behalf of children in the foster care system and is dedicated to promoting, protecting, and securing for every California foster child the legal rights to which they are entitled, including each child's right to safety, security, and a permanent home. While Advokids serves all California foster children, it has a special focus on infants and young children in the foster care system and the effects of insecure placements on their long-term emotional health and well-being because more than 35% of the children entering foster care are under the age of five and remain in the foster care system longer than older children. Advokids' programs include policy advocacy with respect to issues affecting children in foster care. To that end, Advokids has participated as *amicus curiae* in both state and federal court proceedings affecting the rights of children in the foster care system.

Because the Supreme Court of South Carolina's interpretation of ICWA directly affects the rights of adoptive parents and children, *amici* have a significant interest in the questions presented in this case.

STATEMENT

1. Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963, to address the "harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989). Congress determined that state governments in Indian child custody proceedings had "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families," 25 U.S.C. § 1901(5), resulting in the break up and removal of children from Indian families at "an alarmingly high" rate, *id.* § 1901(4). Accordingly, Congress "declare[d] that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families." *Id.* § 1902.

ICWA imposes certain procedural and substantive safeguards applicable in child custody proceedings involving an "Indian child."[2] In addition to affording parents notice, appointment of counsel, and a right of access to reports or documents, ICWA provides that

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[2] An "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

> [n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Id. § 1912(f).

These rights may only be invoked by a "parent," as defined by the Act. Although, as a general matter, the term includes "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child," the term "does not include the unwed father where paternity has not been acknowledged or established." *Id.* § 1903(9).

2. In this case, as in many others, ICWA played a central and dispositive role in determining whether the Indian child would continue to live with her adoptive parents or would be placed in the custody of the biological father she had never met. Baby Girl was born on September 15, 2009, to a non-Indian mother who arranged for and consented to an adoption by a non-Indian couple within days of the birth. Pet. App. 7a. Baby Girl's biological father, a member of the Cherokee Nation, had relinquished his parental rights three months earlier and never attempted to contact his daughter. *Id.* at 4a, 8a. Petitioners filed an adoption proceeding in South Carolina family court. *Id.* at 8a. After being served with Petitioners' adoption complaint, the biological

father, joined by the tribe, opposed the adoption under ICWA. *Id.* at 8a–10a.

The family court awarded custody of Baby Girl to the biological father, and a sharply divided Supreme Court of South Carolina affirmed that decision. Citing the congressional findings and declaration of policy, the state supreme court reasoned that ICWA applied even though Baby Girl had never been a member of an Indian home or culture, thus rejecting the "existing Indian family doctrine." *Id.* at 17a n.17. Moreover, the court held that Baby Girl's biological father was a "parent" within the meaning of ICWA and thus eligible to invoke its parental termination protections. In the court's view, even though "[u]nder state law, Father's consent to the adoption would not have been required," ICWA superseded state parenthood laws. *Id.* at 21a n.19. "[B]y its plain terms," the court concluded, it was enough under ICWA for the biological father to have acknowledged paternity "through the pursuit of court proceedings" and to have established paternity by DNA testing. *Id.* at 22a.

This decision further deepens the conflict among state courts regarding the extent to which ICWA displaces state family law rules that would otherwise apply in these circumstances. This case provides an opportunity for the Court to provide much needed clarification on two important issues that frequently arise under ICWA and that have divided the state courts.

ARGUMENT

I. The Decision of the South Carolina Supreme Court Deepens the Division Among State Courts Regarding the Scope of ICWA.

This case presents two questions that regularly arise under ICWA when a non-Indian parent voluntarily places his or her child for adoption: (1) whether a non-custodial parent can invoke ICWA to block an adoption initiated by a non-Indian parent with custody of the child; and (2) whether an unwed biological father who is not considered a "parent" under state law is nevertheless a "parent" under ICWA. Because the decision in this case further deepens the disagreement among state courts on both questions, this Court should grant the petition and resolve the issues.

A. State Courts Are Divided over Whether ICWA Applies When a Child Being Placed for Adoption Has Never Lived in an Indian Family.

Courts in more than twenty states have addressed the first question presented in this case: whether a non-custodial parent can invoke ICWA to block an adoption where the child has never lived in an Indian family. These courts have deeply divided on this question.

Courts in at least seven states have held that ICWA does not apply in these circumstances.[3] Relying on the statutory text and purpose, these courts have concluded that ICWA applies only when the child has lived in an Indian family. These courts find support for this interpretation in the text of ICWA's involuntary termination provision, which requires a court to consider whether "the *continued* custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f) (emphasis added). Other provisions in ICWA provide further support for the view that the statute presupposes an existing Indian family. *See, e.g.*, *id.* § 1902 (discussing "the removal of Indian children from their families"); *id.* § 1901(4) (addressing the issue of Indian families being "broken up by the removal" of their children). This interpretation of ICWA is commonly referred to as the "existing Indian family doctrine." *See, e.g.*, Joan H. Hollinger, *Adoption Law and Practice*, § 15.03[2][b] (2012) ("existing Indian family doctrine" posits that "if a child, albeit an Indian, is not part of a 'genuine' or 'existing' Indian family, then the Act should not apply").

Other state court decisions, including the South Carolina Supreme Court's decision in this

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[3] *See, e.g.*, *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990); *In re T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995); *In re S.A.M.*, 703 S.W.2d 603, 609 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *5 (Tenn. Ct. App. Apr. 27, 2009).

case, have reached the opposite result.[4] These courts often base their holding on the view that ICWA's "core purpose" is "preserving and protecting the interests of Indian tribes in their children." *In re A.J.S.*, 204 P.3d 543, 550 (Kan. 2009) (quotation marks and citation omitted). Because the tribe has an interest in Indian children regardless of whether they have lived in an existing Indian family, courts have held that the "existing Indian family doctrine" frustrates ICWA's purpose. *Id.*; *see also* Pet. App. 17a n.17.

The need for this Court to resolve the issue is evident from the number of cases—on both sides of the split—that involve facts almost identical to those presented here. For example:

a. In *In re T.R.M.*, 525 N.E.2d 298 (Ind. 1988), the adoptive parents took custody of the child five days after she was born, out of wedlock, to an Indian mother and unknown father. When the birth mother later tried to invoke ICWA to block the adoption, the Indiana Supreme Court held that statute did not apply. *Id.* at 303. The court concluded that the adoption proceeding would not lead to the "'breakup of the Indian family,'" given that "the child was

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[4] *See, e.g.*, *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. Ct. App. 2000); *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832 (Ill. 1993), *rev'd on other grounds* 657 N.E.2d 935 (Ill. 1995); *In re Elliott*, 554 N.W.2d 32 (Mich. 1996); *In re Adoption of Riffle*, 922 P.2d 510 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988).

abandoned to the adoptive mother essentially at the earliest practical moment after childbirth and initial hospital care." *Id.*

b. In *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990), the child was born out of wedlock to a non-Indian mother and an Indian father who refused to acknowledge paternity and be listed on the birth certificate. After the child was placed for adoption with the mother's aunt and uncle, the father invoked ICWA. The state appellate court concluded that "the facts of this case lend themselves to an application of the 'Existing Indian Family' exception." *Id.* at 1189. The court reasoned that "[t]his child was never part of an Indian family environment," had "never been a member of an Indian family, ha[d] never lived in an Indian home, and ha[d] never experience the Indian social and cultural world." *Id.* at 1189–90. Applying ICWA would thus "be contrary to the congressional intent." *Id.* at 1190.

c. In *In re A.J.S.*, 204 P.3d 543 (Kan. 2009), the non-Indian mother of a child born out of wedlock consented to an adoption by members of her family the day after giving birth. The biological father, a member of the Cherokee Nation, invoked ICWA to block the placement. The Supreme Court of Kansas held the existing Indian family doctrine to be inapplicable because: (1) the doctrine "appears to be at odds with the clear language of ICWA, which makes no exception for children" facing the circumstance at issue; and (2) this Court's decision in *Holyfield* "underscored the central importance of the relationship between an Indian child and his or her

tribe, independent of any parental relationship." *Id.* at 547–49.[5]

d. In *In re Baby Boy Doe*, 849 P.2d 925 (Idaho 1993), the child was born out of wedlock to a non-Indian mother and Indian father, who did not maintain any contact with the mother during her pregnancy or with the child following birth. The non-Indian mother, who exercised sole custody, placed the child for adoption with a non-Indian couple shortly after the birth and consented to voluntary termination of her parental rights. Upon receiving notice of the adoption proceeding, the tribe and the father invoked ICWA to block the placement and gain custody. *Id.* at 927–28. Reversing the lower court's decision, the Supreme Court of Idaho rejected the application of the existing Indian family doctrine on the ground that "application of an Indian family requirement would allow the non-Indian mother to circumvent application of ICWA and the tribe's interest in the child by making sure that the child is kept away from the reservation and out of contact with the father and his family," thus

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[5] This decision overruled *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982). In that case, a child was born to an unmarried non-Indian woman, who soon consented to an adoption by non-Indians. The tribe intervened in the adoption proceeding on behalf of the Indian father and invoked ICWA. The court applied the existing Indian family doctrine after conducting a "careful study of the legislative history behind the Act and the Act itself." *Id.* at 175. In its view, ICWA was not meant "to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment." *Id.*

"undermin[ing] the tribe's interest in its Indian children." *Id.* at 927–28.

In these cases, the presence or absence of an existing Indian family is often the dispositive consideration that produces disparate results in identical factual circumstances. Although state courts have had three decades to consider whether ICWA's text and history requires a child to have lived in an Indian family, no consensus has emerged. Instead, courts remain sharply divided on this issue, and will continue to struggle with the question until it is definitively resolved by this Court.

B. State Courts Are Divided over the Circumstances in Which an Unwed Father Is a "Parent" Under ICWA.

State courts have also reached conflicting views on the meaning of "parent" under ICWA. Although ICWA defines the term to include "any biological parent," the statute expressly excludes "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). The statute does not address how an unwed father's paternity is "acknowledged or established," and courts have divided over whether this question should be resolved based on state law.

This Court has long made clear that the relationship between a parent and child is entitled to protection under the U.S. Constitution. *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–19 (1984). But the Court has been equally clear that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require

relationships more enduring." *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (emphasis, quotation marks, and citation omitted); *see also Astrue v. Capato*, 132 S. Ct. 2021, 2030 (2012) ("Notably, a biological parent is not necessarily a child's parent under the law."). As a result, an unwed father's parental rights are constitutionally protected only if he has "demonstrate[d] a full commitment to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child." *Lehr*, 463 U.S. at 261 (alteration in original) (quotation marks and citation omitted).

Apart from these due process limitations, a parent's rights are generally determined by state law. As this Court has long acknowledged, "'[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)). Indeed, the Court has deferred to state laws that allow other parentage presumptions to trump the claims of some fully committed biological parents. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion) (upholding against biological father's challenge California presumption that a mother and her husband are child's only legal parents when cohabiting at the time of conception and birth).

States typically protect an unwed biological father's rights by enacting laws that identify the steps he must take to demonstrate his commitment to the child. For example, many states have adopted

the Uniform Parentage Act (UPA), which provides comprehensive treatment of legal parenthood and specifies the circumstances in which an unwed father should be treated as a child's parent under the law.[6] Under the UPA, unwed biological fathers are not automatically recognized as legal parents. Instead, the UPA, like many other state laws, creates a rebuttable presumption of paternity where certain conditions are met. For instance, section 204(a)(4) of the UPA provides that a presumption of paternity does not attach to a father who is not married to the mother at the time of the child's birth *unless*: (1) the father later marries the mother, (2) the father voluntarily asserts his paternity, and (3) the father files a record of such an assertion with a state agency, appears on the child's birth certificate, or promises in a record to support the child as his own.

Courts in at least five states rely on these state laws to determine whether an unwed father has sufficiently "acknowledged" and "established" his paternity under ICWA.[7] For example, in *In re*

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[6] First adopted in 1973, the UPA provided standards by which a biological father could establish paternity in a modern civil action. In 2000, the UPA was revised to incorporate developments relating to DNA identification, and then updated in 2002 to reflect other permutations of the parent-child relationship brought about by technological advances. *See* Parentage Act Summary, Unif. Law Comm'n, Nat'l Conf. of Comm'rs on Unif. State Laws, *at* http://www.uniformlaws.org/ActSummary.aspx?title=Parentage Act (visited Oct. 26, 2012).

[7] *See, e.g., In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Ct. App. 2003); *In re S.A.M.*, 703 S.W.2d 603, 607 n.4 (Mo. Ct. App. 1986); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 (Okla. 1985), *overruled on other grounds In re Baby* (continued...)

Adoption of Baby Boy D, 742 P.2d 1059 (Okla. 1985), *overruled on other grounds In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004), an Indian father had only intermittent contact with the non-Indian mother of his child during her pregnancy, and upon being informed of her plans to place the child for adoption, the father "made no objection or response" and "did not want to have anything to do with the mother or the child." *Id.* at 1061. After learning that the child was placed for adoption, the father claimed paternity and sought custody. The court denied the father's attempt to rely on ICWA, explaining that the phrase "acknowledged or established" in § 1903(9) must mean "through the procedures available through the tribal courts, consistent with tribal customs, or through procedures established by state law." *Id.* at 1064.

Other courts, however, have interpreted ICWA's definition of "parent" without regard to state law.[8] For example, in this case the South Carolina Supreme Court concluded that Birth Father was a "parent" under ICWA even though he had no parental rights under South Carolina law. Pet. App. 22a. In the court's view, Birth Father "met ICWA's definition of 'parent' by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for

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Boy L., 103 P.3d 1099 (Okla. 2004); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. Ct. 1995).

[8] *See, e.g.*, *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011); *Jared P. v. Glade T.*, 209 P.3d 157, 160–61 (Ariz. Ct. App. 2009).

adoption and establishing his paternity through DNA testing." *Id.*

A comparison of the facts presented here with *Baby Boy D* puts the need for this Court's review into stark relief. In both cases it is undisputed that the biological fathers relinquished their parental rights or, at the very least, took none of the steps required under state law to establish paternity. Yet the Supreme Court of South Carolina—joining courts in Alaska and Arizona—held that ICWA could be invoked by Birth Father, when the Supreme Court of Oklahoma would have held otherwise. In each of these cases, the choice between these two legal standards was outcome-determinative. The Supreme Court of South Carolina's decision in this case is thus squarely in conflict with the rules applied by the Supreme Court of Oklahoma. This legal uncertainty should be resolved.

II. The Questions Presented Raise Issues of Exceptional Importance Regarding the Scope of ICWA.

This Court's review is necessary to provide clarity regarding the scope of ICWA. Defining the outer limits of ICWA is critically important given the constitutional principles at stake and the impact that the current state of uncertainty has on the lives of children and parents, both biological and adoptive.

This case presents important questions regarding the relationship between ICWA and state domestic relations law. In South Carolina, as in most states, child custody controversies are resolved based on the best interests of the child. *See, e.g.*,

Davis. v. Davis, 588 S.E.2d 102, 103–04 (S.C. 2003). The best-interest inquiry attempts to determine, based on the specific facts of a particular case, how to maximize the child's overall welfare, including his or her physical, emotional, and developmental well-being. *Id.*

Under ICWA's involuntary termination provision—the provision at issue in this case—the fact-intensive case-by-case inquiry provided by state law gives way to a categorical presumption that an Indian child's interests are best served by placing him or her in an Indian family. 25 U.S.C. § 1912(f). When an Indian parent seeks custody, this presumption may be rebutted only with proof, beyond a reasonable doubt, that the child will suffer "serious emotional or physical damage" by remaining in the custody of that parent. *Id.* As a result, while both federal and state law strive to achieve what is best for the child, ICWA's involuntary termination provision places such a heavy thumb on the scale in favor of the Indian parent that, as this case demonstrates, it can affect the child's placement.[9]

ICWA's displacement of the best-interests inquiry provided by state law raises important

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[9] ICWA also provides that "a preference shall be given, in the absence of good cause to the contrary, to a placement with" the child's family, tribe, or other Indian families. 25 U.S.C. § 1915(a). By creating an additional presumption in favor of placing an Indian child with an Indian family, this provision further increases the likelihood that a child's placement pursuant to ICWA will differ from the placement that would result under state law.

constitutional concerns. This Court has recognized "the importance of the familial relationship, to the individuals involved and to the society," because of the "emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children, as well as from the fact of blood relationship." *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (internal citation omitted). This is equally true "in the absence of blood relationship," as "[a]doption, for example, is recognized as the legal equivalent of biological parenthood." *Id.* at 844 & n.51.[10] These bonds concern the "creation and sustenance of a family," an area afforded "a substantial measure of sanctuary from unjustified interference from the State." *Roberts*, 468 U.S. at 618–19.

ICWA's displacement of state law also raises important federalism concerns. This Court has long held that child custody issues are governed by "the laws of the States and not . . . the laws of the United States." *Hisquierdo*, 439 U.S. at 581 (quotation marks and citation omitted). In enacting ICWA, Congress suggested that the statute was not meant "to oust the states of their traditional jurisdiction

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[10] Even with respect to familial arrangements short of adoption, the Court has stressed that, "where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family." *Smith*, 431 U.S. at 844.

over Indian children falling within their geographic limits." H.R. REP. NO. 95-1386, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7541. But, as this case demonstrates, ICWA will often have that effect.

The Court should grant the petition because, regardless of how the tension between ICWA and state law is reconciled, there is much to gain from clarity in this area of the law. Uncertainty regarding ICWA's scope has profound effects on the children and parents whose lives are affected by the statute. The uncertainty may result, as in this case, in a child's removal from the custody of the only parents she has known. It also makes prospective parents less likely to pursue adoption because they cannot be sure that a court will uphold the custodial parent's right to consent to the adoption.

When this Court last decided an ICWA case, it recognized that "[t]hree years' development of family ties cannot be undone, and a separation at this point would doubtless cause considerable pain." *Holyfield*, 490 U.S. at 53. And the Court noted that, without the protracted litigation, "much potential anguish might have been avoided." *Id.* at 54. The Court should grant the petition and clarify the scope of ICWA so that Indian children and their parents, both biological and adoptive, can avoid the pain of additional litigation of these issues.

CONCLUSION

For the reasons set forth above, as well as the reasons set forth in the Petition for Certiorari and in the Response of Guardian Ad Litem, as Representative of Respondent Baby Girl, *amici* respectfully request that the Court grant the petition for certiorari.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

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ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Petition for a Writ of Certiorari to the South Carolina Supreme Court

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QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63, applies to state custody proceedings involving an Indian child. A dozen state courts of last resort are openly and intractably divided on two critical questions involving the administration of ICWA in thousands of custody disputes each year:

1. Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

2. Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

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INTEREST OF *AMICUS CURIAE*[1]

The National Council For Adoption (NCFA), founded in 1980 is an adoption advocacy nonprofit that promotes a culture of adoption through education, research, and legislative action. NCFA is an authoritative voice for adoption, passionately committed to the belief that every child deserves to thrive in a nurturing, permanent family. We serve children, birthparents, adoptive families, adult adoptees, adoption agencies, adoption professionals, U.S. and foreign governments, policy makers, media, and the general public as the authoritative voice for adoption throughout the United States. NCFA has 30 years of experience providing guidance, educating on best practices, and serving many thousands of children and families. With regards to domestic infant adoption, NCFA is especially knowledgeable as the only source that continues to count domestic adoptions on the national level. Further, since 2001 NCFA has trained more than 20,000 on how to properly counsel expectant parents on the option of adoption and created a curriculum many use to educate their communities on this issue. As a leading voice on adoption, NCFA believes its special expertise and experience regarding adoption laws, practices, and

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amicus Curiae affirm that no counsel for any party authored this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae and their counsel made a monetary contribution to its preparation or submission.

outcomes place it in a special position to inform the Court about the importance of the concerns in this case, including the need to represent individual children's best interests and the need for practitioners to have a clear understanding of when, how, and to whom to apply the Indian Child Welfare Act.

SUMMARY OF ARGUMENT

All children, including Indian children, require legal systems and practices that can serve the best interests of that particular child and help ensure their right to a permanent, loving family. In order to ensure child welfare practitioners and other participants in the adoption process are able to pursue the best interests of every child, they must have guidance on when, how, and to whom to apply the Indian Child Welfare Act. Children, biological and adoptive parents and others impacted by adoption need to be advised by practitioners on reasonable expectations of outcomes for the child. ICWA's implementation has been varied amongst states and tribes. Specifically, there is not a clear national understanding of whether ICWA applies when a Non-Indian parent voluntarily places a child for adoption and there is not a clear understanding of the definition of parent under ICWA with respect to unwed fathers. State courts' varied implementations of ICWA make its meaning unclear and make it difficult for practitioners to know how to properly implement and educate all those involved in and impacted by the adoption process. When this particular law's meaning is unclear, outcomes for children become unstable and unpredictable, putting at risk a child's right to a permanent, loving family which provides develop-

mentally necessary healthy attachment through consistent caretakers.

REASONS FOR GRANTING THE PETITION

I. Best Interests of the Child Should be the Ruling Priority.

In any civilized society, the way we prioritize the needs of children is a significant indicator of the values of the society. In the United States, acting in the "best interests of the child" is a universally accepted standard when determining child custody decisions, including decisions regarding placing a child in a home for the purpose of adoption. NCFA agrees that this widely held standard should always be the ruling priority by any court deciding the outcome of a child's care. There are a variety of factors that may be considered in weighing the best interests of a child. State courts may name these factors differently, but they consistently consider elements of that specific child's safety, health, and appropriate development. In a case where ICWA is applied, a child's status as an Indian tribe member or child of a tribe member becomes a significant competing factor. We hope this Court will clarify if and when it is appropriate for a child's biological connections to supersede their other interests. This biological factor, as further discussed later, seems to have been given significantly more weight than Baby Girl's other interests in this case. The South Carolina Supreme Court, explained that ICWA and the biological connection it represents were given greater weight than would be given to a case where ICWA was not invoked. Pet. App. 21a-22a n.19.

The question to answer is, whether elevating the priority of race or biology as a more significant factor protects a child's rights. Historically, children's rights were often couched in terms of parental rights, and therefore children rarely had any independent legal rights. *See e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944). The adoption community widely agrees with the position that a child does have a right to grow up in a loving, permanent family. *Mission*, NATIONAL COUNCIL FOR ADOPTION, https://www.adoptioncouncil.org/who-we-are/mission.html (last visited Oct. 15, 2012); *Mission & Values*, DAVE THOMAS FOUNDATION FOR ADOPTION, http://www.davethomasfoundation.org/who-we-are/ mission-and-values/ (last visited Oct. 16, 2012); *Who We Are*, CONGRESSIONAL COALITION ON ADOPTION INSTITUTE, http://www.ccainstitute.org/who-we-are/aboutus.html (last visited Oct. 16, 2012). This ability to grow up safe, provided for, and cared for is certainly amongst the rights of any American to life and liberty.

The need children have for a loving, permanent family does not just feel right, it is a necessity substantiated by extensive scientific evidence that attachment to permanent caretakers is developmentally necessary and that removal from a loving family can be detrimental to a child's psychological development. Attachment and the prevention of traumatic separation is not only about a child's emotional well-being – although this is certainly an important factor to consider. Permanent, consistent caretakers should be maintained whenever safely possible because healthy attachment with familiar, trusted adults is essential to healthy wholistic development. Early childhood development, and more specifically healthy brain development, relies heavily on child and care-

taker relationships. Regular exchange in relationship between young children and trusted caretakers is fundamental to the wiring of the brain. *Three Core Concepts in Early Development: Serve & Return Interaction Shapes Brain Circuitry,* CENTER ON THE DEVELOPING CHILD HARVARD UNIVERSITY, http://developingchild.harvard.edu/index.php?cID=429 (last visited Oct. 15, 2012). Removal from safe and trusted caretakers can slow development and cause negative physical impacts common to trauma and can lead to toxic stress in a child. *Three Core Concepts in Early Development: Toxic Stress Derails Healthy Development,* CENTER ON THE DEVELOPING CHILD HARVARD UNIVERSITY, http://developingchild.harvard.edu/resources/multimedia/videos/three_core_concepts/toxic_stress/ (last visited Oct. 15, 2012). We would advise the court to side with neither nature nor nurture, but instead take into consideration the complete picture of how a child's genetics and environment relate to one another and what outcome will help the child to thrive in life.

An understanding that attachment is developmentally significant can be further informed by noting that a biological connection is not necessary for healthy attachment bonds to develop. Attachment bonds develop regardless of whether a caregiver and child are linked by biology. *See* Joseph Goldstein et al., BEYOND THE BEST INTERESTS OF THE CHILD 27 (2d ed. 1979) (concluding the parent-child relationship can develop without reference to biology or formal adoption). In fact, a child can develop an attachment relationship with any adult who on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's psychical needs. *Id.* at 98; *see also, From Neurons to*

Neighborhoods: The Science of Early Childhood Development, NAT'L RESEARCH COUNCIL & INST. OF MEDICINE 234 (Jack P. Shonkoff & Deborah A. Phillips, Eds., 2000) ("[The c]riteria for identification of attachment figures . . . [include] provision of psychical and emotional care, continuity or consistency in the child's life, and emotional investment in the child."). Furthermore, it has been found to be the *quality* and *nature* of the interaction between parent and child, rather than any biological or legal connection, that creates and sustains these attachment relationships. Ana H. Marty, et al., *Supporting Secure Parent-Child Attachments: The Role of the Non-Parental Caregiver*, 175 EARLY CHILD DEV. & CARE 271, 273 (2005). In the facts of this case, we know that Baby Girl was consistently cared for by Adoptive Parents for more than two years in this way. Further, she was consistently cared for during the first four months of her life before Baby Girl's biological father ever acted in any way to show an interest in Baby Girl's outcome.

In addition to considering if a child's rights are best protected in this process, it is worth considering specifically whether Indian children's rights are unequally impacted. If this Court determined that prioritizing race and culture over other interests might be, at least in some cases, detrimental to a child's development, then it should be noted that this impact is, in fact, having a specifically detrimental effect on the very Indian children Congress set out to protect when they said "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). Congressional intent did not likely include that the ICWA be interpreted so broadly that it would be applied in a way that at times might put the

wellbeing of especially Indian children at risk. Although we believe that race and culture are factors to consider, they should not be considered in a vacuum outside of the many other significant things that contribute to a child's wellbeing. It seems that, as this Court ruled on public education, it is "inherently unequal" to make separate considerations of what is in a child's best interest solely because of their race. *Brown v. Bd. Of Education*, 347 U.S. 483, 495 (1954). This court has decided before, that the 14th amendment was designed to do away with prioritizing race in cases of child custody, because classifying persons according to their race was "more likely to reflect racial prejudice than legitimate public concerns." *Palmore v. Sidote*, 466 U.S. 429, 432, (1984), *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

II. Implementation Guidance is Necessary to Properly Support Adoption, Children, Parents, and All Participants in the Adoption Process.

Without clear expectations of what likely outcomes will be for children, ICWA can have a chilling effect on permanency for children for a variety of reasons. When practitioners do not have a clear understanding of when and to whom ICWA applies they cannot implement appropriately and they cannot fully advise expectant parents, potential adoptive parents, children, or other participants in the adoption process what to expect. The lack of clear ICWA understanding can often lead to slowed court processes and lengthy appeals which bring supplemental court costs to both governments and individuals participating in the adoption process. It also significantly impacts

a child's guarantee of permanency because of the potential of one or multiple removals from familiar caretakers and environments. Adoptive parents may be discouraged from providing needed homes to children. Particularly to children with known Indian heritage, but also to those unknown to have Indian heritage because Indian heritage could be realized later in the process and because publicized complications regarding ICWA may be interpreted as related to adoption more generally. The potential for unpredictable delays, complications, or child removals is most certainly chilling for adoptive parents. A more clear understanding of the questions presented in this case would go a long way to help clarify ICWA's intent and provide positive outcomes for children, birth and adoptive parents, and all others impacted by the adoption process.

A. State Courts are Split on How ICWA Applies When a Non-Indian Parent Voluntarily Makes an Adoption Plan for a Child

State courts are divided on how to proceed when an Indian child born to unwed parents is voluntarily relinquished by its non-Indian Mother. In six states, Alabama, Indiana, Kentucky, Louisiana, Missouri, Nevada, and Tennessee, courts have followed the rule that when a child is being removed from the existing custody of an Indian parent ICWA applies. *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995); *In re S.A.M.*, 703 S.W.2d 603, 609 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL

1138130, at *5 (Tenn. Ct. App. Apr. 27, 2009); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988). When a child was placed in the care of adoptive parents at the earliest practical moment after birth, the Indiana court says it "cannot discern how the subsequent adoption proceeding constituted a 'break-up of the Indian family'" ICWA intends to prevent. *Id.* Courts commonly refer to this system of analysis as the "existing Indian family doctrine," *Rye v. Weasel*, 934. S.W.2d 257, 262 (Ky. 1996). California, Oklahoma, and Washington courts agreed with the existing Indian family doctrine, although state legislations later changed the results. *See In re Beach*, 246 P.3d 845, 848 (Wash. Ct. App. 2011); Wash. Rev. Code §§ 13.34.040[3], 26.10.034[1], 26.33.040[1]; *In re Baby Boy L.*, 103 P.3d 1099, 1105 (Okla. 2004); Okla. Stat. §§ 40.1, 40.3; Cal. Welf. & Insts. Code § 360.6.

The South Carolina Supreme Court agreed with courts in Alaska, Arizona, Colorado, Idaho, Illinois, Kansas, Michigan, Montana, New Jersey, New York, North Dakota, Oregon, and Utah who have held that ICWA applies to adoption proceedings even when the child has never lived as part of an Indian family. *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990); *In re Adoption of T.N.F.*, 781 P.2d 973, 978 (Alaska 1989); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 964 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832, 840 (Ill. App. Ct. 1993), *rev'd on other grounds*, 167 Ill. 2d 250 (Ill. 1995); *In re A.J.S.*, 204 P.3d 543, 547 (Kan. 2009); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 515 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 324

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State disagreements on the application of this federal law are significant, and may be considered more than adequate reason for this court to review this case, but implications become even more tricky when, like this case, the adoption took place across state lines. Further confusion may arise not only on which state's laws to use, but which state's interpretation of ICWA is appropriate. This creates a clear risk for Indian children who can't be guaranteed a predictable outcome and the essential permanence that comes with it.

We hope the court will grant review to resolve this dispute over whether ICWA should be applied and children should be removed when a non-Indian parent voluntarily makes an adoption plan for a child. The facts of this case are uncontested and the case is representative of a common pattern of a mixed race child, including Indian heritage, born to unmarried parents. We believe this makes it a good case for review and that your guidance is necessary to ensure practitioners can do what is right to support children, expectant parents, adoptive parents and all those involved in the adoption process.

B. State Courts are Split on the Definition of a Parent Under ICWA

A second key issue in need of clarification by this court is how parent is defined when ICWA applies to unmarried parents. Congress clearly states in its

definition of parent that it "does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). The federal law does not further explain how a father should acknowledge or establish paternity.

Courts in California, Oklahoma, Missouri, New Jersey, and Texas have interpreted the lack of explanation to mean that state paternity requirements should be applied. *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 (Okla. 1985), *overruled on other grounds In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Cal. Ct. App. 2003); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. Ct. 1995); *In re S.A.M.*, 703 S.W.2d 603, 607 n.4 (Mo. Ct. App. 1986).

The South Carolina Court's decision in this case differed, finding that ICWA did not defer to state law to establish appropriate legal paternity. Instead, they follow the examples of Alaska and Arizona courts who have ruled that meeting state standards to acknowledge or establish paternity is not necessary. *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) and *Jared P. v. Glade T.*, 209 P.3d 157, 160-61 (Ariz. Ct. App. 2009).

We hope the court will grant review to clarify the definition of parent with regards to unmarried fathers when ICWA is applied. As with the issue of voluntary placement, the facts of this case are uncontested and the case is representative of a common fact pattern of a child being born to unmarried parents. We believe this makes it a good case for review and that your guidance is necessary to ensure practitioners can do what is right to support children,

ensure the rights of birth fathers, educate adoptive parents and advise all those involved in the adoption process.

C. ICWA's Proper Application Needs Clarification to Align with Congress' Intent

The Court's guidance is necessary to determine the proper interpretation and application of ICWA because there may be a discrepancy between the purpose of ICWA and its results. Congress passed ICWA to combat the issue of *involuntary* removal of Indian children by social services. Studies presented at Senate hearings showed that 25 to 35% of all Indian children were separated from their families and placed in foster care or adoptive families. *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989). Indian children were eight times more likely to be placed in adoptive homes than non-Indian children. *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989). Additionally, 90% of adopted Indian children were placed in non-Indian homes. *Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989). As a result, Indian leaders saw this epidemic as a threat to the fabric of Indian culture. *See Mississippi Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989).

Involuntary removal spurred the passage of ICWA, but Congress drafted ICWA in a manner that allowed it to apply to all removal situations. Such a position was enforced by this Court in *Mississippi Choctaw Indians v. Holyfield*. 490 U.S. 30, 34 (1989) ("Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption,

because of concerns going beyond the wishes of individual parents. As the 1977 Final Report of the congressionally established American Indian Policy Review Commission stated, in summarizing these two concerns, '[r]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.'"). Attempts to clarify this issue have not gone far enough. States are still at odds on whether ICWA applies in situations where a non-Indian parent voluntary places the child for adoption. Petition for Writ, 12-13. By granting a writ of certiorari, this Court can end considerable nationwide confusion.

Inconsistent application of the law amongst the Indian tribes should also encourage this Court to hear this case. ICWA only applies to Indian children who are either a member of a tribe or are eligible for membership of the tribe. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1902, 1903(4). Each tribe's eligibility requirements vary, creating instances where there application of ICWA may be inconsistent. For example, a child is eligible for membership to the Cherokee Nation if they can prove a lineal ancestor is listed on the Dawes Roll. *Citizenship*, CHEROKEE NATION, http://www.cherokee.org/Services/TribalCitizenship/30869/Information.aspx (last visited Oct.15, 2012). Under such a rule, a child with very little Cherokee blood can qualify as a citizen of the Cherokee Nation and, therefore, would be subject to ICWA. In contrast, a child is only eligible for Navajo citizenship if they are 1/4 Navajo. *Frequently Asked Questions*, NAVAJO NATION, http://www.navajo-nsn.gov/contact.htm#roots (last visited Oct. 15, 2012). Such a requirement shrinks the pool of children subject to ICWA. Further, a tribe may change their

enlistment requirements at any time. If a tribe expands who is eligible for membership a child already placed for adoption or in foster care may become eligible after the point at which application of ICWA might normally be considered in a case. This places an unpredictable burden on those responsible for finding homes and determining if a home is appropriate for a child. These variations in tribal eligibility may result in an unpredictable and unequal implementation of ICWA.

D. Tribal Rights and the Rights of Individual Parents and Children are at Odds

ICWA makes it difficult to know whether to prioritize the rights and best interests of the tribe or the rights and best interests of the individuals involved. Parents and children's rights are arguably at odds with the rights and interest of the tribe at times. In *Troxel v. Granville*, this Court affirmed parents' fundamental right to the custody and care of the child. 530 U.S. 57, 65-66 (2000). When the parents' rights and state interest conflicted, this Court held that "so long as a parent adequately cares for his or her children (*i. e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v. Granville*, 530 U.S. 57, 69 (2000). In this instance, the mother adequately cared for Baby Girl by acknowledging that she was not best capable of supporting her newborn child and deciding that making an adoption plan was in the best interest of her child. Brief for Petitioner at 4a, *Adoptive Couple v. Baby Girl*, No. 12. The parent's

right to make this decision is arguably at odds with that of the tribe when ICWA is interpreted to apply to voluntary placements of a child.

Further, rights of the individual child, their life experiences, and the parts of them that are not Indian may be considered at odds with ICWA. Passage of ICWA as a means of remedying damage to the Indian family unit and tribe was an understandable course of action in response to the unfair history of Indian child removal. It is questionable, however, whether Congress' intent was to make secondary the many other interests of a child besides their right to participate in the tribal community and the tribe's right to have them in the community.

CONCLUSION

This case should be heard by the Court for two reasons. The best interests of that particular child should be of the utmost priority in determining any child's outcome. A ruling on this case will allow the Court an opportunity to clarify and enforce each child's right to the best loving and permanent home for them. The current unpredictable outcomes of ICWA cases threaten a child's need for stability and their healthy development through attachment to consistent, trusted caregivers.

Second, guidance is necessary to clarify when, how, and to whom ICWA should apply. Proper implementation of this law should do what is best for children first and then for all others impacted by an adoption. Practitioners need to be able to predict likely outcomes when ICWA is applied. This ensures they act in compliance with ICWA in order to provide the best support to children, ensure the rights of birth par-

ents, protect rights of Indian tribes, educate adoptive parents, and advise all those involved in the adoption process.

Respectfully submitted,

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PETITIONER'S BRIEF

Supreme Court, U.S.
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No. 12-399

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,
Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, ET AL.,
Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

(1) Whether a non-custodial parent can invoke the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63, to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

(2) Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

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OPINIONS BELOW

The opinion of the South Carolina Supreme Court is reported at 731 S.E.2d 550 (S.C. 2012). Pet. App. 1a. The decision of the South Carolina family court is unpublished. *Id.* 103a.

JURISDICTION

The South Carolina Supreme Court affirmed the decision of the family court on July 26, 2012. Petitioners timely filed a petition for rehearing on August 9, 2012, which the court denied on August 22, 2012. Pet. App. 132a. The petition for a writ of certiorari was filed on October 1, 2012, and granted on January 4, 2013. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901–23, is reproduced in the Appendix, *infra*, 1a-18a.

INTRODUCTION

After unceremoniously renouncing his parental rights to his unborn daughter—Baby Girl—in a text message and making no effort to see Baby Girl for months after she was born, Father stepped in at the eleventh hour to block an adoption that was lawful and in the "best interests" of Baby Girl. Father claimed the authority to break up the adoptive family because Baby Girl is a "biological child of a member of an Indian tribe" and is herself eligible for membership. 25 U.S.C. § 1903(4). The state courts determined that state law and the best interests of Baby Girl must yield to federal law, and by command of court order Baby Girl was taken from petitioners

after the family had been together for over two years. The overriding question in this case is whether Congress intended that result. It did not and could not have.

The law that purportedly required this heart-wrenching outcome is the Indian Child Welfare Act (ICWA), passed by Congress in 1978 to reduce "harm to Indian parents and their children who were involuntarily separated by decisions of local welfare authorities" and to protect "the relationship between Indian tribes and Indian children domiciled on the reservation." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34, 52 (1989). Congress found that a "high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. § 1901(4). ICWA "'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society' . . . by establishing 'a Federal policy that, where possible, an Indian child should remain in the Indian community.'" *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23 (1978)).

The state court's application of ICWA here transformed a statute that *prevents* the removal of Indian children from their homes into a statute that *required* the removal of an Indian child from her home. The facts of this case could hardly be further from the circumstances Congress addressed through ICWA. The state court construed ICWA to dictate the formation of a new Indian family and the creation of new parents and new custodial rights in a way that

perversely broke up an existing family. The court held that an unwed biological father of Indian lineage who has abandoned a pregnant mother and child may veto the non-Indian mother's lawful decision to place her child for adoption, even though under state law the father lacked custodial rights and his consent was not required for the adoptive placement.

The statutory text, structure, and purpose preclude the state court's interpretation. ICWA applies only to those unwed biological fathers who already have parental rights. The Act's definition of "parent" does not resuscitate rights that those men have repudiated and abandoned. And even if the definition of "parent" includes any proven biological father, ICWA still would not allow the creation of new Indian families and new custodial rights. Provision after provision in ICWA apply only when there is a preexisting Indian family and preexisting custodial rights.

Doubt on any of these issues would be resolved by the canon of constitutional avoidance. The creation of parental and adoption-veto rights from whole cloth under ICWA is based on race, unmoored to any legitimate federal interest in protecting existing tribal ties, culture, or self-government. Conferring superior rights on unwed fathers and tribes would also perniciously interfere with the fundamental rights of child-bearing women who choose adoptive placements, over single parenthood, for their children. Preferential rights also would disadvantage abandoned Indian children in desperate need of secure and stable homes. And allowing substantive parental rights to originate under federal law starkly displaces the historical police power of States to protect vulnerable women and encourage the adoption of abandoned children.

We do not doubt that some fathers who initially renounce a desire to be a parent may sincerely have a change of heart about parenthood upon learning of a mother's adoptive placement. But our society has long barred unwed fathers from joining the game of child-rearing too late. The law limits the window of opportunity for unwed fathers to embrace parenthood to protect a child's paramount interest in forming immediate and stable family bonds. The necessity of prompt decision-making comes even earlier for unwed pregnant mothers. ICWA does not upset these principles and does not permit the unwed father who acts too late under state law to veto the mother's adoptive placement.

We also assume that the Tribe here is sincere in believing that any child with any amount of Indian blood should be raised in an Indian home. But ICWA struck quite a different balance that does not countenance the chaos and heartbreak that would ensue if tribes or noncustodial fathers with no right to object to an adoption could later uproot Indian children from their adoptive families. ICWA does not, as respondents contend and the court below held, impose a Kafkaesque exercise requiring mothers and prospective adoptive parents to endeavor to "rehabilitate" absentee fathers and also go in search of an Indian family to raise the child.

STATEMENT

A. ICWA Overview

ICWA applies to a "child custody proceeding," such as an "adoptive placement," that involves an "Indian child." 25 U.S.C. § 1903(1)(iv). The Act defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian

tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *Id.* § 1903(4). ICWA further defines "parent" as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." *Id.* § 1903(9).

In any contested adoption proceeding where the court knows "that an Indian child is involved," ICWA requires notice be given ten days before the adoption hearing to the parent and applicable Indian tribe. *Id.* § 1912(a). The Act also provides the tribe with the opportunity to intervene. *Id.* § 1911(c).

In order to finalize an adoption of an Indian child, state courts must find "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Id.* § 1912(d). A court must also apply a special federal standard under section 1912(f) for the termination of parental rights in lieu of state law. Section 1912(f) states that "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." The Act further provides that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other

members of the Indian child's tribe; or (3) other Indian families." *Id.* § 1915(a).

B. Facts of the Case

Baby Girl's biological parents—"Mother" and "Father"—self-identify respectively as Hispanic and Indian.[1] They became engaged to be married in December 2008. Pet. App. 2a. Father was then serving in the military and was stationed at Fort Sill, Oklahoma, while Mother lived four hours away in Bartlesville, Oklahoma. *Id.* 3a. One month after the engagement, Mother informed Father in January 2009 that she was pregnant. *Id.* 2a-3a; Trial Tr. 245-46. Mother asked him to assist with medical expenses before the first doctor's visit in February; Father refused. Pet. App. 4a. He withheld any financial support throughout the pregnancy, stating that he would offer support only if he and Mother were married. Trial Tr. 249. He pressed Mother to quit her job, move to the military base with her two other children, and marry him immediately so that his military pay would increase. *Id.* 487. When Mother demurred, the couple's relationship deteriorated, and Mother broke off the engagement in May 2009. Pet. App. 3a.

In June 2009, Mother asked Father if he would rather pay child support or surrender his parental rights. Father, who had by then known about the pregnancy for five months without giving any support to Mother, responded in a text message that he

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[1] As used herein, "Indian" has its statutory meaning. 25 U.S.C. § 1903(3). Our reply brief at the petition stage (at 5-6 n.1) stated that Baby Girl is 1/16 Cherokee. We have since reviewed records from Baby Girl's paternal grandparents reflecting that Baby girl is 3/256 Cherokee.

was renouncing his parental rights. *Id.* 4a. Father expected Mother to raise the baby by herself, explaining that he did not feel "responsible as a father" unless Mother married him. Trial Tr. 547. Father never provided Mother with financial assistance for pregnancy-related expenses, despite his ability to do so. Father did not accompany her to any doctor's visits, even though he admitted he was capable of doing so. *Id.* 248, 546-47. As Father explained:

> Q: [Y]ou were prepared to sign all your rights and responsibilities away to this child just so long as the mother was taking care of the child?
>
> Father: That's correct.
>
> Q: And you would not be responsible in any way for the child support or anything else as far as the child's concerned?
>
> Father: Correct.

Id. 545.

As a single mother with two other children, Mother decided in June 2009 to place Baby Girl for adoption. Pet. App. 4a. The Nightlight Christian Adoptions Agency in Oklahoma introduced Mother to petitioners ("Adoptive Parents"), who reside in Charleston, South Carolina, and had undergone seven unsuccessful attempts at in vitro fertilization. Trial Tr. 110. Adoptive Mother has a Ph.D. in developmental psychology and develops therapy programs for children with behavioral problems. Adoptive Father is a technician with Boeing. Mother selected Adoptive Parents so Baby Girl "can look up to them and they

can give her everything she needs when needed." Pet. App. 5a.

Mother had no legal obligation at that time to contact the Cherokee Nation, in which Birth Father is enrolled as a member. *Cf.* 25 U.S.C. § 1912(a) (notice required only ten days before court adjudication of custody). But to make an early determination of ICWA's applicability *vel non*, Mother's attorney wrote to the Cherokee Nation on August 21, 2009 (one month before Baby Girl's birth) to inquire about Father's tribal membership status. Mother's attorney wrote that "the baby's father is supposedly enrolled with the Cherokee Nation." JA 5. The letter provided Father's full name but misspelled his first name as "Dustin" rather than "Dusten." *Id.*; Pet. App. 6a. The letter noted that Father was "presently in the army at Fort Sill, Oklahoma." JA 6. The letter further noted that the prospective adoptive parents were not Indian. *Id.* The Cherokee Nation responded on September 3, 2009 that, based on the information provided, Father was not a member of the Cherokee Nation and that ICWA did not apply to the adoption proceeding. JA 8.[2]

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[2] Because respondents have previously imputed bad motives to the misspelling of Father's name, it bears mention that Father *himself* signed and submitted multiple documents during this litigation in which his first name was misspelled. Father's name is variously misspelled "Dustan" and "Dustin" on three checks that Father submitted in 2011. JA 70, 75, 76. Father also submitted a brief in which he was referred to as "Justen," Br. of Plaintiff at 9, *Brown v. Maldonado*, No. FP-10-13 (Okla. Dist. Ct., Wash. Cnty.), and filed a motion in which he was referred to as "Dustin," Motion for Emergency Relief at 4, Case No. 2009-DR-10-3803 (S.C. Fam. Ct. July 8, 2011); *see also* Pet. App. 98a n.71 (Kittredge, J., dissenting). The August 2009 letter also misidentifies Father's birthday. Mother did not know

Oklahoma law likewise places no obligation on mothers to inform unwed birth fathers of their adoption plans. Okla. Stat. tit. 10 §§ 7503-3.1, 7505; Infant Adoption Training Initiative, "Frequently Asked Questions About Adoption in Oklahoma" 4, *available at* http://www.iaatp.com/docs/FAQs-OK.pdf. That is typical. "Unwed mothers generally have no obligation to inform prospective fathers of pregnancies or of the post-birth whereabouts of offspring." Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (And Other Parenthood) After* Lehr *and* Michael H., 43 U. Tol. L. Rev. 225, 243 (2012).

Adoptive Parents supported Mother financially and emotionally during her pregnancy and shortly after Baby Girl's birth. They spoke to Mother weekly, and Adoptive Mother traveled to visit her in Oklahoma in August 2009. They paid for medical expenses associated with the pregnancy. Pet. App. 5a.

Baby Girl was born on September 15, 2009. *Id.* 2a. Adoptive Parents were in the delivery room during the delivery, and Adoptive Father cut the umbilical cord. The next morning, Mother placed Baby Girl with Adoptive Parents and signed forms consenting to the adoption. *Id.* 7a. The adoption consent form identified Baby Girl's ethnicity as "Caucasian/Native American Indian/Hispanic." JA 19. Father sought no contact with Baby Girl in the months after her birth, despite knowing her due date. Pet. App. 8a; Trial Tr. 489-90.

When Baby Girl was placed with Adoptive Parents on September 16, 2009, Mother and Father had never

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Father's exact birthday, Trial Tr. 267, 310, and we note that in the Cherokee Nation's intervention notices, the Tribe twice listed the incorrect birth date for Baby Girl. JA 41, 54.

lived together, and Father had neither supported Mother with pregnancy-related expenses nor provided support for the child. Pet. App. 4a. Because Father "took no pro-active steps to protect his parental rights to the child" in the eight months after he became aware of Baby Girl's pending birth, *id.* 105a, Father's consent to the adoption was not required under South Carolina state law. S.C. Code § 63-9-310(A)(5). South Carolina law requires notice to putative fathers only thirty days before an adoption is finalized. S.C. Code § 63-9-730(E).

On September 16, 2009, Mother executed an Interstate Compact Placement Request form pursuant to the Interstate Compact on the Placement of Children (ICPC), Okla. Stat. tit. 10, § 577, which governs interstate adoption placements. Mother identified Father by name as Baby Girl's biological parent. JA 28. In the box titled "Ethnic Group," Baby Girl's ethnicity was reported as "Caucasian/Native American Indian/Hispanic," and Hispanic was circled by hand. *Id.* Oklahoma's ICPC administrator reviewed and signed the form on September 18, 2009, and South Carolina's ICPC administrator counter-signed the form on September 21, 2009, authorizing the interstate placement with Adoptive Parents. *Id.*; *see id.* 29 (final approval); Okla. Stat. tit. 10, § 577, art. V.

Adoptive Parents initiated adoption proceedings in South Carolina on September 18, 2009. Pet. App. 8a. They returned to South Carolina with their daughter eight days after the birth. *Id.* 7a. On January 6, 2010, Adoptive Parents served Father with notice of the pending adoption. Even though a putative father's *consent* to an adoption is unnecessary in cases where the father has abandoned the mother and child, South Carolina law requires 30-days' prior

notice to putative fathers before an adoption may be finalized. S.C. Code §§ 63-9-310(A), 63-9-730(E). When served with the complaint, Father signed and dated a formal answer, stating that he accepted service of the summons and complaint, "that he is the birth father of the minor child, Baby Girl," "and that he is not contesting the adoption." JA 37. Father later testified that when signing the form he believed that he was signing away his rights to Mother. Trial Tr. 535-36.

On January 11, 2010, Father requested a stay of the South Carolina adoption proceedings pursuant to the Servicemember's Civil Relief Act, 50 U.S.C. § 522. Pet. App. 9a. Three days later, Father filed a complaint against Mother and Adoptive Parents in Oklahoma for custody of Baby Girl. Father's verified complaint represented that "[n]either the parent nor the child[] have Native American blood. Therefore the Federal Indian Child Welfare Act . . . and the Oklahoma Indian Child Welfare Act . . . do not apply." *Id.* 50a (Kittredge, J., dissenting). The Oklahoma action was the first indication to anyone that Father intended to contest the adoption. *Id.* 9a n.10. At that time, Baby Girl was four months old, and Father had not sought any contact with her. *Id.* 8a.

By January 12, 2010, representatives of the Cherokee Nation were aware of the South Carolina proceeding and had confirmed Father's registration with the Tribe. JA 34-35. However, Adoptive Parents were not made aware of Father's Cherokee membership until around March 30, 2010, when the Tribe intervened in the Oklahoma action. JA 41-43. Adoptive Parents amended their South Carolina complaint the following day to acknowledge Father's Cherokee

status. JA 44. One week later, the Tribe intervened in the South Carolina case but did not participate in the proceedings for the next seventeen months; the Tribe entered an appearance just two days before the trial began. On April 12, 2010, the Bureau of Indian Affairs acknowledged that the "Cherokee Nation has been properly notified of the proceedings" in South Carolina. JA 52.[3]

By the time Adoptive Parents learned definitively of Father's Cherokee status in March 2010, they had raised Baby Girl as their daughter for more than six months.

C. Proceedings Below

1. The adoption proceeding was tried before a South Carolina family court in September 2011, at which point Baby Girl had been living with her Adoptive Parents for two years. Pet. App. 10a. The child's guardian *ad litem* recommended that the adoption be approved in the best interests of the child. JA 132. Mother urged the court to finalize the adoption. Trial Tr. 258.

The family court applied ICWA, denied the adoption petition, and ordered that custody of Baby Girl be transferred to Father. Pet. App. 130a. The

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[3] On March 16, 2010, the Oklahoma court granted Adoptive Parents' motion to dismiss Father's suit, and Father did not appeal. Respondents continued to contest the propriety of Baby Girl's transfer to South Carolina, but the South Carolina Supreme Court held that the Oklahoma decision "remains the law of the case." Pet. App. 20a. The court nonetheless commented that the "evidence establishes" that Baby Girl would not be in South Carolina had the Tribe received notice earlier. *Id.* 19a. We know of no law that would have blocked the transfer, and the court below identified none.

court acknowledged that application of state law would have led to the approval of the adoption and the termination of Father's parental rights. *Id.* 120a-121a. The family court ordered Adoptive Parents to surrender their daughter to Father on December 28, 2011. *Id.* 130a. Days after Christmas, and after living as a family for twenty-seven months, Adoptive Parents handed Baby Girl over to Father. *Id.* 11a.

2. A divided panel of the South Carolina Supreme Court affirmed. *Id.* 1a-40a.

The majority held that Father was a "parent" under Section 1903(9) who could invoke the Act's substantive provisions. *Id.* 22a. The majority acknowledged that "[u]nder state law, Father's consent to the adoption would not have been required." *Id.* 21a-22a n.19. The court held that the biological father's "lack of interest in or support for Baby Girl during the pregnancy and first four months of her life as a basis for terminat[ing] his rights as a parent is not a valid consideration under the ICWA." *Id.* 32a n.26.

The majority also rejected the "existing Indian family doctrine," which some state courts have held prevents ICWA from interfering with the voluntary adoption of an Indian child born out of wedlock under the sole custody of a non-Indian parent. *Id.* 17a-18a n.17. The majority further held that Adoptive Parents did not satisfy the Act's requirement to show that "active efforts have been made to provide [to Father] remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have provided unsuccessful," 25 U.S.C. § 1912(d). Pet. App. 26a-27a. The court explained that Adoptive Parents could have taken measures "for example, by attempting to stim-

ulate Father's desire to be a parent or to provide necessary education regarding the role of a parent." *Id.* 26a.

The majority further held that the adoption could not proceed consistent with Section 1912(f)'s requirement to show that Father's "continued custody" would be seriously detrimental to Baby Girl. The court reasoned that Adoptive Parents had not shown that Father's "prospective legal and physical custody" would seriously damage the child. *Id.* 28a-33a. The court finally observed that placement with Adoptive Parents, who are not Indian, did not comport with ICWA's "hierarchy of preferences" for adoptive placement with the child's extended family, the child's Tribe, or other Indian families absent good cause. *Id.* 37a-39a.

Two justices dissented and would have "require[d] the immediate return of Baby Girl to [Adoptive Parents]." *Id.* 100a.

SUMMARY OF ARGUMENT

I. The term "parent" under ICWA means "any biological parent . . . of an Indian child . . . . It does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). That definition includes only those unwed fathers with substantive parental rights under state law.

A. Congress intended courts to apply the definition of "parent" with reference to state law rather than federal law. Any time Congress acts, the venerable presumption is that it intends to respect the traditional boundaries between state and federal power. That presumption is at its zenith in the area of

domestic relations given the traditional responsibility of the States in such matters. This Court regularly looks to state laws that define parental status to determine the applicability of federal rights. ICWA is no different, as Congress did not intend to "oust the State from the exercise of its legitimate police powers regulating domestic relations." H.R. Rep. No. 95-1386, at 17.

B. ICWA's text precludes defining "parent" to require only a proven biological link between an unwed father and Indian child. The first sentence of Section 1903(9) already includes acknowledged or established biological parents, and thus the second sentence requires more of a parental relationship than biology alone. Moreover, Congress did not plausibly intend to extend ICWA to sperm donors and, indeed, even rapists who can prove a biological relationship to an Indian child. The second sentence is thus best read to require that unwed fathers have acknowledged or established parental *rights* under state law. Any other result would permit biological fathers of Indian children to repudiate their parental responsibilities under state law while retaining a back-pocket veto over the mother's choice to place her child for adoption.

A focus on preexisting rights is consistent with ICWA's purpose. Congress did not pass the Act to resuscitate parental rights expressly repudiated by an unwed father, but rather to protect his existing parental rights and to preserve his and his tribe's existing relationship with the Indian child. The State's paramount interest in immediately securing the welfare of the child and ensuring a reliable statutory scheme for adoption prevents the unwed

father from grasping the reins of parenthood only after he learns of the mother's adoptive plans.

II. Even if any proven biological father is a "parent" under Section 1903(9), he may not invoke Sections 1912(d) and 1912(f) to block adoptions voluntarily initiated by an Indian child's sole custodial parent.

A. By their terms, Sections 1912(d) and (f) apply only to parents who have preexisting custodial rights under state law. Where a non-Indian parent with sole custody of an Indian child decides to place the child for adoption, the subsequent adoption proceeding does not result in the "breakup of an Indian family" (which Section 1912(d) is designed to prevent) or affect the "continued custody" of the child by her Indian parent (which Section 1912(f) is designed to protect). Because there was no preexisting Indian family here, the court below twisted ICWA's text to create a new Indian family from whole cloth.

B. A myriad of other provisions in the Act confirm that Congress did not authorize courts to create new custodial rights. Those provisions also textually preclude noncustodial parents from invoking substantive protections. Those provisions more broadly show that neither fathers nor tribes can use ICWA to block an adoption in the absence of a preexisting Indian family.

C. Congress passed ICWA to stem the number of Indian children involuntarily removed from their homes by government officials and placed in foster care or adoptive homes without sufficient sensitivity to the family's cultural norms. This case could not be further from that scenario. When the adoption of an Indian child is voluntarily and lawfully initiated by a

non-Indian mother with sole custodial rights, ICWA's core purpose to prevent the involuntary removal of Indian children and dissolution of Indian families and culture is not implicated at all, much less advanced.

It is one thing to conclude from the extensive legislative history that when Indian children are ripped from their reservations or Indian homes, Congress intended that where possible those children should retain their existing tribal ties through adoptive and foster-care placements in Indian environments. But it is an entirely different matter when the Indian child *never* had a connection to an Indian family because the child was never domiciled on tribal land and the Indian father severed all ties even before the child was born. In the latter situation, neither the father nor the tribe has any legitimate interest or right to dictate how the child is raised by the non-Indian mother with sole custody. No good reason exists for inferring that Congress was hostile towards adoption of Indian children when those children otherwise would be raised in a single-parent *non-Indian* home.

III. The court's interpretation of ICWA raises grave constitutional concerns under the Equal Protection Clause, the Due Process Clause, and the Tenth Amendment.

A. Equal protection principles require that any Indian preference flow from a tribe's unique sovereign status and not from mere "ancestral" classification. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Where an Indian child is eligible for tribal membership simply because of her blood lineage, ICWA is triggered by the child's racial status unmoored to tribal sovereignty, culture, or politics. When ICWA is

applied consistent with its text, history, and purpose to preserve preexisting parental rights and the child's preexisting connection to the tribe, ICWA's application at least preserves the possibility of maintaining the child's connection to the tribe. But when a father through his own actions and before the child's birth renounces his parental rights and severs any possible connection between the child and the tribe, any placement preference under ICWA would occur solely on the basis of race and only for the purpose of creating a family of a particular race.

B. Interpreting ICWA to confer new custodial rights on absentee fathers significantly interferes with the substantive due process right of a mother to direct the upbringing of her child. Using the Act to create new families comes only at the cost of destroying other families—*i.e.*, the family formed between the child and an adoptive couple chosen by the mother. If ICWA forces mothers to choose between single parenthood or risking that the father who abandoned her and her child will control her child's destiny, then ICWA tramples the fundamental rights of mothers and the interests of Indian children in securing a stable and loving home.

C. Principles of federalism are also at stake. The recognition *vel non* of parents and their custodial rights has always been a matter of state law. Properly interpreted, ICWA bolsters the protection of existing parental rights that are established and recognized by the States; ICWA does not create new parents, new parental rights, and new Indian families. Due respect for the federal-state balance commands that ICWA be read to avoid such an extraordinary intrusion on state law by the federal government.

IV. Section 1915(a) establishes a hierarchy of preferences for adoption of Indian children that include a member of the child's extended family, other members of the child's tribe, or other Indian families. The state court viewed that provision as excluding Adoptive Parents, as non-Indians, from adopting Baby Girl. The court reasoned that ICWA gives a tribe an independent right to preclude non-Indians from being parents even absent a preexisting Indian family—*i.e.*, when the sole-custodial mother is non-Indian and the child's connection to the tribe is by virtue of bloodline alone.

The court's construction of Section 1915(a) would impose a *de facto* ban on interracial adoptions and punish countless abandoned Indian children in need of adoptive homes. As with ICWA's other substantive provisions, Section 1915(a) applies only if an Indian child is removed from a preexisting Indian family. At a minimum, Section 1915(a) does not apply when no party specified in the provision steps forward to adopt an Indian child. In that situation, there is no preference to apply. Because here only Adoptive Parents sought custodial placement of Baby Girl at the adoption hearing, Section 1915(a) was not implicated.

ARGUMENT

I. AN UNWED BIOLOGICAL FATHER WHO HAS NO PARENTAL RIGHTS UNDER STATE LAW IS NOT A "PARENT" UNDER SECTION 1903(9)

It is undisputed that under state law Father's consent to the adoption of Baby Girl was not required because he abandoned Mother during pregnancy and Baby Girl at birth. The South Carolina Supreme

Court nonetheless held that Father could veto the adoption under ICWA notwithstanding that state law dictated the placement of Baby Girl with Adoptive Parents. Pet. App. 21a-22a n.19; *accord id.* 120a-122a. The court reasoned that an unwed father is a "parent" under ICWA so long as he has a biological link to an Indian child and contested the adoption after receiving notice. *Id.* 22a. But ICWA does not create a new class of "parents." The Act instead protects existing parental rights that already have been acknowledged or established. The Act does not resuscitate parental rights for unwed fathers who under state law repudiated those very rights and flouted their parental responsibilities to the pregnant mother and child.

A. State Law Determines the Meaning of "Parent"

The second sentence of Section 1903(9) excludes from the definition of "parent" "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). That sentence does not refer to some ill-defined federal notion of "parent." That sentence incorporates state laws (or, where applicable, tribal law or customs) requiring fathers to take affirmative steps to acquire parental rights, including the right to object to an adoptive placement of his biological child.

The word parent "describes a legal status" that "requires a reference to the law of the State which create[s] those legal relationships." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956). This Court thus has looked to state laws that define parental status when interpreting the applicability of federal rights. For example, state law determines whether a parent has standing to represent his child's constitutional

rights. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004) ("Newdow's parental status is defined by California's domestic relations law."). "[W]here a statute deals with a familial relationship," this Court has found it "proper, therefore, to draw on the ready-made body of state law to define the meaning of the word 'children'" under the Copyright Act. *De Sylva*, 351 U.S. at 580; *cf. Astrue v. Capato*, 132 S. Ct. 2021, 2031 (2012) (Under the Social Security Act, "[r]eference to state law to determine an applicant's status as a 'child' is anything but anomalous.").

Those precedents reflect that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)). "Because domestic relations are preeminently matters of state law, [this Court has] consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area." *Mansell v. Mansell*, 490 U.S. 581, 587 (1989). Reference to state law "avoid[s] congressional entanglement in the traditional state-law realm of family relations." *Capato*, 132 S. Ct. at 2031.

A State's traditional and exclusive domain over family affairs differentiates this case from the holding of *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). There the Court held that federal law controls the definition of "domicile" under ICWA's jurisdictional provision, Section 1911(a). The Court saw "no reason to believe that Congress intended to rely on state law for the definition of a critical term" that delineates when tribal courts have exclusive jurisdiction over custody

disputes involving an Indian child. *Id.* at 44. The Court also found it "beyond dispute that that Congress intended a uniform federal law of domicile for the ICWA." *Id.* at 47.

Those rationales do not apply to the definition of a non-jurisdictional term that has always varied state by state. The States have long possessed the ability "to retain the unique attributes of their respective bodies of family law." *Lehr v. Robertson*, 463 U.S. 248, 256 n.11 (1983). The House Report on ICWA explains that "the provisions of the bill do not oust the State from the exercise of its legitimate police powers in regulating domestic relations." H.R. Rep. No. 95-1386, at 17. Congress could not have intended that state courts would adopt a uniform federal standard of parent and paternity. There was and is no ready-made body of federal law to define parent, paternity, parental rights, or the standard for proving a biological link between a father and a child. Those concepts have no meaning without reference to state law.

B. An Unwed Biological Father Is a "Parent" Only if He Possesses Parental Rights Under State Law

1. The text of ICWA's "parent" definition requires more of an unwed father than an established or acknowledged biological connection to the child. The first sentence of Section 1903(9) defines "parent" as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom." 25 U.S.C. § 1903(9). The second sentence excludes a subset of unwed biological fathers "where paternity has not been acknowledged or established." *Id.* Because the first sentence already

covers an unwed father whose biological link is acknowledged or established, the canon against superfluity counsels reading the second sentence to require more than a proven biological connection. *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 933 (2009) (statutes should "be construed in a manner that gives effect to all their provisions"). In other words, the second sentence may not be construed to be a "zero set."

As initially passed by the Senate, ICWA's definition of "parent" would have included all unwed biological fathers. This definition provided only that "[p]arent means the natural parent of an Indian child or any person who has adopted an Indian child in accordance with State, Federal, or tribal law or custom." Indian Child Welfare Act of 1977, S. 1214, § 4(i) (Nov. 8, 1977). The House of Representatives, however, added the second sentence as it currently appears. Indian Child Welfare Act of 1978, H.R. 12533, § 4(9) (May 3, 1978). By excluding from the definition of "parent" certain unwed fathers, Congress made the conscious decision not to define "parent" based on proven biology alone.

Congress's treatment of "parent" in a related statute passed within months of ICWA underscores that ICWA requires something more than an established biological connection to an Indian child. In 1978, Congress passed "An Act relating to judgment funds awarded by the Indian Claims Commission to certain Indian tribes," Pub. L. No. 95-433, 92 Stat. 1047 (codified at 25 U.S.C. § 609c), which defines "parent" as "the biological or adoptive parent or parents, or other legal guardian, of a minor." 25 U.S.C. § 609c(6). This definition mirrors the first sentence of Section 1903(9). The existence of Section 1903(9)'s

second sentence shows that not all proven biological fathers fall within ICWA's definition of "parent."

2. In order to give meaning to Section 1903(9)'s exclusion of unwed fathers "where paternity has not been acknowledged or established," this Court should look to the overall structure of the Act. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). ICWA protects parental *rights* and the parent-child *relationship*. *See* 25 U.S.C. §§ 1912-1914. The only sensible reading of the second sentence excludes unwed fathers who have no parental rights under state law. "Congress, in passing the ICWA, was concerned not so much with creating parental rights as protecting parental rights that had been recognized or established through legal provisions outside the Act." *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 938 (N.J. 1988). Thus, "Congress included a definition that excludes unwed fathers who have not taken steps to ensure that their relationship with the child would be recognized." *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. Ct. App. 1995).

This interpretation reflects the well-recognized distinction at law between unwed mothers and fathers. A "mother carries and bears the child, and in this sense her parental relationship is clear." *Nguyen v. INS*, 533 U.S. 53, 62 (2001) (quotation omitted). The same cannot be said of unwed fathers. *Id.* at 67. Congress passed ICWA with the understanding that "a biological parent is not necessarily a child's parent under law." *Capato*, 132 S. Ct. at 2030.

In *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), this Court invalidated a state statute that conclusively presumed that unwed fathers of children born out of

wedlock were unfit parents, even where the father had raised his children for years. In *Quilloin v. Walcott*, 434 U.S. 246 (1978), decided nearly a year before ICWA's enactment, the Court upheld the constitutionality of a state statute that authorized the adoption, over the objection of the biological father, of a child born out of wedlock because the father had provided little child support and had not "sought . . . actual or legal custody of his child." *Id.* at 255. While *Stanley* involved a "fully developed relationship," *Quilloin* involved only an "inchoate" one. *Lehr*, 463 U.S. at 261 n.17. In the latter situation, "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Id.* at 262. *Lehr* thus upheld the constitutionality of a statute that permits adoption without prior notice to a biological father who had not "established any significant custodial, personal, or financial relationship" with his child. *Id.*

In light of these principles, South Carolina limits the parental rights of unwed fathers to those who have timely embraced parenthood. Unwed fathers may not wait until they learn of a mother's adoptive plans before expressing a desire to be a parent. "[B]ecause of the child's need for early permanence and stability in parental relationships," an unwed father's opportunity "to preserve his inchoate relationship with his child . . . is of limited duration." *Abernathy v. Baby Boy*, 437 S.E.2d 25, 28 (1993). An unwed father must provide "material assistance to the mother-to-be during the pregnancy and, the law thus assumes, to the child once it is born." *Roe v. Reeves* 708 S.E.2d 778, 783 (2011) (quotation omitted). "It is not enough that the father simply have a desire to raise the child; he must act on that interest

and make the material contributions to the child and mother during her pregnancy required of a father-to-be." *Id.* at 784. "He must not be deterred by the mother-to-be's lack of romantic interest in him, even by her outright hostility. If she justifiably or unjustifiably wants him to stay away, he must respect her wishes but be sure that his support does not remain equally distant." *Id.* at 783. In short, the unwed father who stands up only after he is notified of adoption proceedings commits too late. *Id.* at 785.

As relevant here, South Carolina law provides that the consent of the unwed biological father is not required to finalize an adoption if he failed to pay "a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses." S.C. Code § 63-9-310(A)(5). Because Father failed this test, state law dictated a final adoption decree in favor of Adoptive Parents. Pet. App. 21a-22a n.19, 120a-121a. Father consciously withheld all support, leaving Mother with the sole right to place Baby Girl with Adoptive Parents, who immediately raised Baby Girl upon her first breath. State law would have prevented the tragedy that occurred here by precluding Father from reentering the picture at the eleventh hour, vetoing Mother's decision, and uprooting Baby Girl from what should have been her stable and permanent home.

The definition of "parent" in ICWA incorporates these established principles. The second sentence of Section 1903(9) was "not meant to conflict with the decision of the Supreme Court in *Stanley*." H.R. Rep. No. 95-1386, at 21. Congress was aware of, and

made a conscious decision not to disturb, the State's inherent police power to limit an unwed father's rights when he has not formed a relationship with his child. *In re Adoption of a Child of Indian Heritage*, 543 A.2d at 934.

Congress could not plausibly have intended to preempt an entire body of state law in favor of a biological test. Nor could Congress plausibly have intended to allow putative fathers to shirk their parental responsibilities while retaining a back-pocket veto over the mother's choice for an adoptive placement of her child. The prospect of having an adopted child taken away after she and her adoptive parents have bonded would seriously chill families from adopting a child suspected of having Indian ancestry. That result punishes Indian children desperately in need of adoptive homes.

The state court's interpretation would stymie the adoption process in derogation of the "legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously." *Lehr*, 463 U.S. at 265. To allow unwed fathers a second bite at the apple would "complicate the adoption process, threaten the privacy interest of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees," all to the detriment of a State's ability to protect its most vulnerable citizens. *Lehr*, 463 U.S. at 264.

3. The state court held Father was a parent under Section 1903(9)'s second sentence because he sought custodial rights when he learned of the adoptive placement and he underwent DNA testing. Pet. App. 22a. Respondents likewise argue that under South Carolina law for "Paternity and Child Support,"

Father established his paternity through a DNA test. Br. in Opp. 27 (citing S.C. Code § 63-17-30(A)). Those contentions do not withstand scrutiny.

The fact that an unwed father may object when he learns of an adoptive placement is beside the point if his objection comes too late in the day to give him parental rights under state law. That is particularly so when state law explicitly denied him the right to object to the mother's adoptive placement because he renounced all obligations to mother when she was pregnant and repudiated any interest in the child. As far as DNA test results are concerned, a biological link imposes potential *obligations* on fathers to pay child support. S.C. Code §§ 63-17-10 *et seq*. A support obligation is not a parental right. Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology "Plus" Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 Wm. & Mary J. Women & L. 47, 48 (2004). Moreover, the possibility of a child support obligation is hardly relevant when, as here, the child since birth has been raised and financially supported by adoptive parents.

Any reliance on a child support obligation also cannot be squared with respondents' reading of the text to require only that unwed fathers "affirm paternity or take reasonable steps to establish paternity *as a factual matter*." Br. in Opp. 30 (emphasis added). "Paternity as a factual matter" is nothing more than a biological standard that would sweep in sperm donors and rapists. And if respondents advance a definition that requires something *beyond* a biological link, the choice is then between (a) the steps an unwed father must take under state law to acquire parental *rights* or (b) state law governing parental *obligations* when a father conceives a child.

ICWA is a child placement statute, not a child support statute. The only appropriate test is one that comports with the purposes of ICWA to protect existing familial rights. Respondents' focus on biology and parental obligations has nothing to recommend it, and a host of human tragedy, chaos, and disruption to the state adoption process to counsel against it.

II. A PARENT MUST HAVE CUSTODY OF AN INDIAN CHILD TO INVOKE SECTIONS 1912(d) AND 1912(f)

Even if the state court correctly interpreted the term "parent," reversal still is required because the court further erred in holding that ICWA creates custodial rights and creates Indian families anew—*i.e.*, when they would *not* otherwise exist under state or tribal law. Specifically, Sections 1912(d) and (f) do not permit a noncustodial father to veto the adoptive choices made by a non-Indian mother when state law confers on the mother sole custodial rights with respect to the Indian child.

A. The Statutory Text Precludes Application to Parents Without Custodial Rights

At every turn, ICWA signals Congress's intent to prevent the involuntary dissolution of an existing Indian family. Prospective parents who wish to adopt an Indian child voluntarily placed for adoption by a non-Indian mother must satisfy the court that a non-consenting father was provided programs "designed to prevent the breakup of the Indian family," and that those programs failed. 25 U.S.C. § 1912(d). Prospective parents further must show that the "continued custody" of the father would seriously

harm the child. 25 U.S.C. § 1912(f). Both of these provisions apply only when the objecting parent seeks to preserve a preexisting Indian family.

1. Section 1912(d) requires measures "designed to prevent the breakup of the Indian family"

Section 1912(d) requires that a party seeking adoptive placement "shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). This provision presupposes a prior custodial relationship. The provision cannot be applied to noncustodial parents consistent with the text. Prospective adoptive parents cannot satisfy a court that they offered remedial and rehabilitative efforts to a father in order "to prevent the breakup of the Indian family" when a mother who initiates the adoption has sole custody over the Indian child. In such cases, there is no "Indian family" that includes the father to break up.

This case is illustrative. The state court held that a "straightforward application of the language of Section 1912(d) requires that remedial services be offered to address any parenting issues to prevent the breakup of the Indian family—for example, by attempting to stimulate Father's desire to be a parent or to provide necessary education regarding the role of a parent." Pet. App. 26a. Such services inherently cannot be "designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). Father had no familial relationship with Baby Girl.

It further would be both perverse and cruel to require prospective adoptive parents, who desperately want to raise the child, to find and convince the father who abandoned that child to grasp the reins of parenthood. It is unthinkable that Congress intended to inflict this burden on adoptive parents, particularly if the prospective parents have already formed familial bonds with the child. No prospective parents would subject themselves to that gauntlet, leaving abandoned Indian children at a unique disadvantage in securing a loving home. It is also highly dubious that Congress intended to force prospective parents to conjure up ways to "to stimulate" a parental desire in someone who never demonstrated an interest in parenthood. Pet. App. 26a. As Justice Kittredge aptly explained in dissent: "I view this as requiring not merely efforts to rehabilitate a nonexistent parent-child relationship, but rather to perform a miracle." *Id.* 93a n.68.

The majority also stated that "had the tribe been properly noticed of the adoption from the outset, it would have been the tribe's prerogative to take remedial measures to reunify the Indian family." *Id.* 26a n.22. Again, there was no preexisting Indian family to "reunify," and any remedial measures likewise could not have been "designed to prevent the breakup of the Indian family" as required by Section 1912(d). Moreover, if the burden were on the *Tribe* to satisfy Section 1912(d), the Tribe could always veto an adoptive placement by refusing to offer the services. Section 1912(d) would never be satisfied unless the Tribe itself sought involuntary termination of parental rights.

Finally, ICWA does not require mothers or prospective adoptive parents to notify a tribe of their

adoptive plans so that tribes can cajole fathers to seek custodial rights in order to veto the lawful adoptive choices made by mothers and adoptive parents. Quite the contrary, ICWA requires only ten days' prior notice before an adoptive placement is made. 25 U.S.C. § 1912(a); *cf.* JA 52 (confirming that the Cherokee Nation had notice sixteen months before trial). And as discussed, state law imposes no duty on mothers to tell unwed fathers of their adoptive choices. The burden rather is on the unwed father to take affirmative steps to form a relationship with his child.

2. Section 1912(f) requires "continued custody"

State custody disputes have long been governed by the principle that courts make child custody decisions in the best interest of the child. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Hooper v. Rockwell*, 513 S.E.2d 358, 366 (S.C. 1999). ICWA significantly deviates from state law in imposing an extraordinarily stringent standard before a court may make a custody determination over the objection of an Indian child's "parent." The text of Section 1912(f) states:

> No termination of parental rights may be ordered in [a child custody] proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the *continued custody* of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f) (emphasis added); *see id.* § 1912(e) (requiring same finding regarding "continued cus-

tody" before ordering foster care placement of Indian children, albeit by clear and convincing evidence). A court applying Section 1912(f) thus requires prospective adoptive parents to show that the "continued custody" by the objecting parent would seriously harm the child.

The text plainly presupposes that absent termination of parental rights, the child will continue in the custody of the objecting parent. The adjective "continued" necessarily connotes a preexisting condition. "Continued" means "carried on or kept up without cessation; continual; constant" or "extended in space without interruption or breach of connection." Compact Oxford English Dictionary 538 (1972). "Continued" also can mean "resumed after interruption." Webster's Third New International Dictionary 493 (1961). Both meanings lead to the same result: custody must already exist before it can be "continued."

Given the plain meaning of "continued," a court may apply Section 1912(f) only if it can assess the effect on the child's well-being from the continued custody by her parent. Absent custody, any such inquiry is impossible. The lower court's application of Section 1912(f) again illustrates the point. At the time of the adoption proceeding, Father had no physical or legal custodial rights under state law (and he has never argued otherwise).[4] Because he had no prior parent-child relationship, Father could

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[4] "[T]he custody of an illegitimate child is *solely* in the natural mother." S.C. Code § 63-17-20(B) (emphasis added); S.C. Code Regs. 114-4730 ("legal custody" means "decision-making authority with respect to the child(ren)"). Oklahoma law is the same. Okla. Stat. tit. 10, § 7800 ("the mother of a child born out of wedlock has custody of the child").

argue only that he now "desire[d] to be a parent to Baby Girl." Pet. App. 32a. For their part, Adoptive Parents could argue only that removal of Baby Girl from *their* "continued custody" would seriously harm the child. *Id.* 29a-32a; *id.* 73a-86a (Kittredge, J., dissenting). In other words, neither party could marshal the facts to fit the statutory language.

Faced with the impossibility of faithfully applying the text of the statute, the South Carolina Supreme Court ignored the notion of "continued custody" and held that Section 1912(f) "requires a showing that the *transferee* parent's *prospective* legal and physical custody is likely to result in serious damage to the Indian child." *Id.* 32a (emphases added). But "Section 1912(f) says no such thing." *Id.* 84a n.64 (Kittredge, J., dissenting). The court thus reworded the text and applied the reworded statute to find "that Father's custody of Baby Girl would [not] result in serious emotional or physical harm to her beyond a reasonable doubt." *Id.* 29a. And while the family court adhered to the statutory text, that court asked counter-factually whether "the child will suffer physical or emotional damage *if returned to the custody* of her biological father," *id.* 128a, even though Father never had legal or physical custody—indeed, he had never even met Baby Girl.

Neither the parties nor the court can apply the language of Section 1912(f) when the parent who invokes the provision has no preexisting custodial rights with respect to the child. Congress presumably did not pass a statute that can be invoked by a party with respect to whom the court cannot make the findings required by the language of the statute. It necessarily follows that Congress did not

intend noncustodial parents such as Father to invoke Section 1912(f)'s heightened protections.

B. Other Provisions of ICWA that Apply Only to Custodial Parents Confirm that the Act Does Not Create Custodial Rights

It would be bad enough to overlook the statutory language in both Sections 1912(d) and (f). But respondents' reading would cause courts to ignore the text in other provisions throughout the Act that apply only to parents who have a preexisting custodial relationship with an Indian child. Those provisions, like Sections 1912(d) and (f), confirm that the Act does not create custodial rights or mandate new Indian families but rather protects rights and families that already exist. These provisions thus show that neither fathers nor tribes can invoke ICWA to block an adoption without an existing Indian family.

1. Section 1914's reference to an Indian child unlawfully "removed" from the parent's "custody"

Section 1914 provides that "any parent . . . from whose *custody* such child was *removed* . . . may petition any court of competent jurisdiction to invalidate [a termination of parental rights under State law] upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title." 25 U.S.C. § 1914 (emphases added). For instance, if a court makes a custodial placement of an Indian child in violation of Section 1911(a) (exclusive jurisdiction in tribal courts), in violation of Section 1912(a) (lack of notice), or in violation of Section 1913(a) (improper execution of voluntary consent), a parent from whose custody the Indian child was unlawfully removed

may seek invalidation of the action under Section 1914.

Section 1914 presents the same conundrum for respondents as Sections 1912(d) and (f), which also are textually linked to a parent's preexisting custody. Either courts must ignore the textual reference in Section 1914 to "custody" and "removed" to apply that provision to noncustodial parents, or courts must interpret Section 1914 to exclude noncustodial parents. And if the latter is the case, Sections 1912(d) and (f) should be given parallel treatment and construed consistent with their text to exclude noncustodial parents.

2. Section 1916's references to "return" of "custody" and "from whom such custody the child was originally removed"

Section 1916(a) provides that "whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for *return of custody*." 25 U.S.C. § 1916(a) (emphasis added). The court "shall grant such petition unless there is a showing . . . that such *return of custody* is not in the best interests of the child." *Id.* (emphasis added). This provision by its terms refers only to parents who seek a return of custody. A biological parent with no custodial rights under state law either may not invoke Section 1916(a) consistent with the text, or courts would have to look beyond the text to extend the provision to noncustodial parents. This conundrum disappears when ICWA is read, consistent with its text, not to create custodial rights.

Section 1916(b) presents the same problem for respondents. That provision states that "[w]henever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with [ICWA], except in the case where an Indian child is being returned to the parent . . . from whose custody the child was originally removed." *Id.* § 1916(b). The last clause of this provision—"where an Indian child is being *returned* to the parent . . . from whose *custody* the child was *originally removed*"—refers only to the removal of Indian children from their custodial parents and ensures that ICWA will not interfere with the return of the child to her parent.

If the State places an Indian child in foster care, Section 1916(b)'s special protection for the parent would be limited to the custodial parent "from whose custody the child was originally removed," unless a court overlooks the text and extends Section 1916(b) to treat custodial and non-custodial parents alike. The more natural inference is that Congress repeatedly distinguished between custodial and non-custodial parents and granted only the former the substantive protections of ICWA.

3. Section 1913's reference to "return to the parent"

Section 1913(b) provides that "[a]ny parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, *the child shall be returned* to the parent or Indian custodian." 25 U.S.C. § 1913(b) (emphasis added). Section 1913(c) likewise states that "[i]n any voluntary proceeding for termination of

parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn . . . and the child *shall be returned* to the parent." *Id.* § 1913(c) (emphasis added). And Section 1913(d) requires courts to "return the child to the parent" if the parent's consent to an adoption was obtained through fraud or duress. *Id.* § 1913(d). Thus, Section 1913 throughout presupposes that the parent has a preexisting custodial relationship with an Indian child.

The state court invoked Section 1913(c) in noting that Father had withdrawn his initial consent to the adoption. Pet. App. 24a-25a. Withdrawal of consent triggers the mandate under Section 1913(c) that the child shall be "returned to the parent." But because Father never had custody, Baby Girl could not be returned to him. Once again, reading the Act to permit the creation of custodial rights does not square with the Act's repeated references to preexisting custodial rights.

4. Section 1920's reference to "improperly removed the child from custody of the parent" and "return" to the parent

Section 1920 provides that whenever a petitioner "has improperly *removed* the child from *custody* of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court . . . shall forthwith *return* the child to his parent." 25 U.S.C. § 1920 (emphases added). Section 1920, like all the provisions discussed above, presupposes that that ICWA parents have custodial rights and that their children can be "returned" to them. Congress's repeated references to custodial rights throughout

the Act demonstrate that ICWA does not create new custodial rights.

C. The Creation of Custodial Rights Does Not Further ICWA's Purpose To Preserve an Indian Child's Existing Tribal Connections

1. Congress did not pass ICWA to form new Indian families. Nor did it pass the statute to protect a parent who voluntarily severs his relationship with his child from the outset. Rather, the Act "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Holyfield*, 490 U.S. at 32. The "basic purpose of this legislation is to stem the outflow of Indian children from Indian homes." *Indian Child Welfare Act of 1978: Hearing on S. 1214 Before the H. Comm. on Interior and Insular Affairs*, 95th Cong. 29 (1978). Congress also noted the high number of Indian children removed from an Indian environment and placed in a non-Indian foster-care or adoptive home. *Holyfield*, 490 U.S. at 32-33. To protect the "rights of the Indian community and tribe in retaining its children in its society," ICWA establishes that "where possible, an Indian child should remain in the Indian community." *Id.* at 37 (quotation omitted).

When an adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian mother with sole custodial rights, ICWA's purpose to prevent the unwarranted removal of Indian children and the continuation of their existing Indian ties is not

implicated. No Indian family is being broken up and no Indian child is being removed from the custody of her parents. As cases applying the existing Indian family doctrine have explained, "where the child was abandoned to the adoptive [parents] essentially at the earliest practical moment after childbirth and initial hospital care," ICWA's substantive provisions do not apply because adoptive placement of the child would not cause the "breakup of the Indian family." *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988) (quotation omitted). In other words, ICWA does not block "the voluntary relinquishment of an illegitimate Indian child by its non-Indian mother." *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990). "ICWA was never meant to apply in those cases . . . where the Indian children had lived with their non-Indian mothers." *Rye v. Weasel*, 934 S.W.2d 257, 263 (Ky. 1996); *see In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *In re S.A.M.*, 703 S.W.2d 603, 608 (Mo. Ct. App. 1986).

Some cases applying the existing Indian family doctrine have conditioned ICWA's application on the sufficiency of a custodial Indian parent's ties to his or her tribal heritage. *See, e.g.*, *Hampton v. J.A.L.*, 658 So. 2d 331, 336-37 (La. Ct. App. 1995); *In re Adoption of Crews*, 825 P.2d 305, 310 (Wash. 1992). Courts that have rejected the existing Indian family doctrine have criticized the propriety of examining whether a preexisting Indian family is "Indian" enough to merit protection under ICWA. *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009); *In re D.A.C.*, 933 P.2d 993, 999 (Utah Ct. App. 1997). That criticism is not relevant here, as there is no preexisting family consisting of Father and Baby Girl. Whether or not an Indian child would be raised in an "Indian-enough" environ-

ment is accordingly not at issue, and we make no such argument that questions Father's tribal ties. Father's cultural practices and ties to his Tribe are beside the point because Father, in abandoning Baby Girl, severed any familial ties to Baby Girl and prevented any connection from forming between Baby Girl and the Tribe. Father thus removed himself from the protections of ICWA, and the Tribe may not invoke ICWA to create a new Indian family.

2. The scope of the Act also demonstrates Congress's intent to stem the outflow of Indian children from Indian homes but not to create new Indian families. "ICWA does not apply to custody disputes between parents, either as part of a divorce or non-divorce proceeding." B.J. Jones et al., The Indian Child Welfare Act Handbook 5 (ABA, 2d ed. 2008). As the Bureau of Indian Affairs explained shortly after the Act was passed, ICWA does not apply to any "domestic relations proceeding[] . . . so long as custody is awarded to one of the parents." Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,587 (Nov. 26, 1979); *see Starr v. George*, 175 P.3d 50, 54 (Alaska 2008); *Application of DeFender*, 435 N.W.2d 717, 721 (S.D. 1989); *Arneach v. Reed*, 3 Cher. Rep. 9, 2000 WL 35789445, at *3 (E. Cherokee Sup. Ct. Dec. 15, 2000); *cf.* 25 U.S.C. § 1903(1). Non-custodial fathers and their tribes accordingly have no rights under ICWA if the non-Indian mother foregoes adoption and raises the child herself, regardless of whether she exposes the child to an Indian culture. For instance, had Mother, who is Hispanic, elected to raise Baby Girl as part of a "Hispanic family," neither Father nor the Tribe could invoke ICWA, much less insist Baby Girl be raised as part of an "Indian family."

When ICWA is read to protect preexisting Indian families, the Act reflects legislative neutrality as to whether a non-Indian mother with sole custody of an Indian child chooses single parenthood or adoption. Yet the court below read ICWA in a way that forces tribal affiliation only on *adopted* Indian children. When there is no net loss of an Indian family, nothing in the Act's text, history, or purpose supports the notion that Congress intended to interfere with adoptions of Indian children by non-Indian parents when those children otherwise would be raised in a single-parent non-Indian home. This Court should not read ICWA as placing a congressional thumb on the scale against adoption as a means of raising a child.

This Court's decision in *Holyfield* does not support extending ICWA beyond the protection of existing Indian families and existing ties between the child and an Indian community. *Holyfield* held that parents domiciled on a reservation could not defeat the tribal court's exclusive jurisdiction by removing the child at birth from the reservation. 490 U.S. at 53. The Court noted that the parents' attempt to circumvent tribal jurisdiction conflicted with the independent interest of the tribe in Indian children domiciled on the reservation. *Id.* at 49-53. The "sole issue" in *Holyfield* was whether the Indian children were domiciled on the reservation. *Id.* at 42. The Court did not pass on the propriety of the adoption, and on remand, the tribal courts approved the adoption. Pet. App. 41a (Kittredge, J., dissenting). Where a father abandons an Indian child in such a way that prevents the creation of an Indian family (much less one on a reservation), nothing in *Holyfield* suggests that Congress intended to create an Indian family anyway.

III. INTERPRETING ICWA TO CREATE NEW PARENTAL RIGHTS RAISES GRAVE CONSTITUTIONAL CONCERNS

The text, structure, and history of ICWA compel the conclusion that the interpretation adopted by the South Carolina Supreme Court cannot stand. But far more momentous forces are at play in this case. Consideration of those issues reinforces the conclusion that Congress did not intend this result.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (quotation omitted). "[W]hen deciding which of two plausible statutory constructions to adopt, . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quotation omitted)). "This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991).

A. Creation of Parental Rights Based On Indian Lineage Conflicts with Principles of Equal Protection

This Court has upheld preferential treatment for Indians where the differentiation is a consequence of Indians' unique sovereign status. *Morton v. Mancari*, 417 U.S. 535, 553 (1974). But differential treatment predicated solely on "ancestral" classification violates equal protection principles. *Rice v. Cayetano*, 528 U.S. 495, 514, 517 (2000). This careful balance reflects "the moral imperative of racial neutrality [that] is the driving force of the Equal Protection Clause," where "racial classifications are permitted only as a last resort." *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion of Kennedy, J.) (quotation omitted). "To the extent there is any doubt" over competing interpretations of a statute, this Court "resolve[s] that doubt by avoiding serious constitutional concerns under the Equal Protection Clause." *Id.* The Fifth Amendment's prohibition against race discrimination thus requires that ICWA's application be sufficiently tied to the government's interest in preserving tribal connections.

Baby Girl is an "Indian child" because she is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe," here the Cherokee Nation. 25 U.S.C. § 1903(4). Baby Girl's eligibility for membership in the Cherokee Nation depends solely upon a lineal blood relationship with a tribal ancestor. *See* Cherokee Nation, Tribal Registration, http://www.cherokee.org/Services/TribalRegistration/Default.aspx; Cherokee Heritage

Documentation Center, Blood Quantum, http://tinyurl.com/bloodquantum.[5]

When the preferences under Sections 1912(d) and 1912(f) are construed to protect preexisting connections between an Indian child and her custodial parent, there is at least the possibility that the child could be exposed to Indian culture or tribal politics through her Indian parent. The same is true if Section 1903(9) includes only biological fathers with preexisting parental rights. ICWA's preferences in those circumstances at least plausibly prevent the unwarranted removal of Indian children from their families and safeguard tribal cultural and social cohesion. 25 U.S.C. § 1901.

Any legitimacy evaporates if unwed fathers with no preexisting substantive parental rights receive a statutory preference based solely on the Indian child's race. In that circumstance, "[i]f tribal determinations are indeed conclusive for purposes of applying ICWA, and if . . . a particular tribe recognizes as members all persons who are biologically descended from historic tribal members, then children who are related by blood to such a tribe may be claimed by the tribe, and thus made subject to the provisions of ICWA, solely on the basis of their biological heritage." *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 527 (Cal. Ct. App. 1996). When unequal treat-

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[5] Many tribes similarly condition eligibility for membership on ancestral lineage alone. *See, e.g.*, Choctaw Nation of Oklahoma, http://www.choctawnation.com/services/departments/enrollment-cdib-and-tribal-membership/; Chickasaw Nation, http://www.chickasaw.net/about_us/index_2288.htm; Muscogee Creek Nation, http://www.muscogeenation-nsn.gov/index.php/citizens-information/citizenshipcriteria.

ment is predicated on a status unrelated to social, cultural, or political ties, but rather blood lineage, the ancestry underpinning membership is "a proxy for race." *Rice*, 528 U.S. at 514.

The state court's decision confers on noncustodial fathers a preferential right to abandon their parental responsibilities under state law while reserving the right to veto an otherwise lawful adoption decision made by a non-Indian mother. Outside of ICWA, no other non-custodial fathers have that right. And when the father has no custodial rights under state law, the mother has the sole right to raise the Indian child with no cultural or political connection to the tribe. Under such circumstances, the creation of custodial rights is based on biology alone and solely for the purpose of creating an Indian family that would not otherwise exist but for the racial preference. That result is not sufficiently tied to "Indian self-government." *Mancari*, 417 U.S. at 555. Rather, the creation of such rights classifies citizens based solely on bloodline. *See In re Santos Y.*, 112 Cal. Rptr. 2d 692, 715 (Cal. Ct. App. 2001).

In commenting on the Act before it was passed, the Department of Justice expressed the concern that preferences unmoored to *existing* tribal ties were constitutionally problematic under equal protection principles. Judge Patricia Wald, then-Assistant Attorney General, advised Congress that exclusive tribal jurisdiction over child custody proceedings "may constitute racial discrimination" when applied to a noncustodial Indian parent. H.R. Rep. No. 95-1386, at 39. Judge Wald wrote that the Department of Justice "d[id] not think that the blood connection between the child and a biological but noncustodial parent is a sufficient basis upon which to deny the

present parents and the child access to State courts." *Id.* She further stated that the constitutionality of tribal jurisdiction should be tied to whether "a parent who is a tribal member has legal custody of a child . . . eligible for membership at the time of a proceeding." *Id.*

Similar equal protection principles are at stake when ICWA confers an Indian preference without a sufficient tribal connection between the child and the parent. Where the father has neither preexisting custodial rights over the child nor a state law right to contest an adoptive placement, the only basis for the Indian preference is blood lineage. Because at a minimum the state court's construction of ICWA raises serious equal protection issues, any doubt about the statute's meaning must be resolved by construing Sections 1903(9), 1912(d), and 1912(f) not to create new substantive parental rights.

B. Creation of Parental Rights Based On Indian Lineage Conflicts with Principles of Substantive Due Process

ICWA's application to fathers with no substantive parental rights under state law also would raise serious questions under the substantive component of the Due Process Clause. It has long been established that parenthood and child-rearing fall within the most basic and fundamental liberties protected by substantive due process. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (Opinion of O'Connor, J.); *id.* at 95 (Kennedy, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849, 851 (1992) (Opinion of O'Connor, J.); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Stanley*, 405 U.S. at 650; *Prince v.*

Massachusetts, 321 U.S. 158, 166 (1944). Encompassed within parenthood and child-rearing is a sole-custodial mother's decision to place her child in an adoptive home. *Y.H. v. F.L.H.*, 784 So. 2d 565, 571-72 (Fla. Dist. Ct. App. 2001). If ICWA can be construed to avoid significantly interfering with such a fundamental liberty interest, this Court should adopt a limiting constitutional construction. *E.g.*, *Casey*, 505 U.S. at 879-80 (Opinion of O'Connor, J.).

The state court's interpretation of the Act places profound and unjustified burdens on pregnant women facing single parenthood who will have to make what is likely the most difficult decision of their lives. The court's decision paves the way for a non-custodial biological father to force a non-Indian mother into making a choice between raising her baby herself or risking that the man who abandoned her and the child will take custody of the child many months or even years after the child's birth if the mother decides that adoptive placement is best for her child. Cert. Br. Amicus Curiae AAAA, at 11. And for those women who would rather raise the child themselves than risk that the father will use ICWA to block the adoption, the state court's interpretation necessarily prevents those women from making decisions that they believe are in the best interest of their children. *See* Shirley C. Samuels, Ideal Adoption: A Comprehensive Guide to Forming an Adoptive Family 62-63 (1990). The state court's construction also will undoubtedly cause some unwed pregnant women to consider terminating the pregnancy of an unborn child conceived with a man of Indian lineage, rather than face the uncertainty whether those women can place their children in a loving adoptive home of her choice. Cert. Br. Amica

Curiae of Birth Mother, at 7. This Court should not lightly assume that Congress intended these results.

It also should go without saying that those consequences have direct, life-changing implications for Indian children. Respondents' construction of ICWA raises profound constitutional questions about "the nature of a child's liberty interests in preserving established familial or family-like bonds." *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting). "[T]his Court has not yet had occasion to elucidate the nature" of those rights. *Id.*; *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (reserving the question). If there was ever a case that might cause the Court to confront the issue, it is this one. Respondents' reading of ICWA uniquely deprives Indian children of placement determinations that serve their best interests. Their reading unquestionably chills prospective parents from adopting abandoned Indian children. And their reading means that where a mother rolls the dice and places her Indian child with an adoptive home, that child still could be ripped from the adoptive home with devastating consequences, as this case sadly illustrates. Rather than resolve the foundational liberty questions implicated by this case, the canon of constitutional avoidance strongly supports reading Sections 1903, 1912(d), and 1912(f) as limited to parents with preexisting parental rights.

C. Creation of Parental Rights Based On Indian Lineage Conflicts with Federalism Principles

This Court regularly interprets federal statutes to avoid questions over Congress's power to upset the federal-state balance. *Nw. Austin Mun. Utility Dist. v. Holder*, 557 U.S. 193 (2009); *Raygor v. Regents of*

Univ. of Minnesota, 534 U.S. 533, 544-45 (2002); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng.*, 531 U.S. 159, 174 (2001); *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 789 (2000); *Gregory v. Ashcroft*, 501 U.S. 453, 461 (1991); *United States v. Bass*, 404 U.S. 336, 349-50 (1971).

Under the Supremacy Clause, Congress may give more robust protection to rights established under state law. But it is qualitatively different for the federal government to create a new class of parents, new substantive parental rights, and new families in wholesale derogation of state law. The recognition *vel non* of parents and their custodial rights is uniquely a matter of state concern and historically within the exclusive domain of the States. The state court nevertheless interpreted ICWA as creating a new federal class of parents that consists of unwed fathers holding no parental rights under state law. The court likewise read Sections 1912(d) and (f) to create custodial rights that would not exist under state law. Those holdings, either alone or in combination, create new substantive parental rights out of whole cloth. That result raises serious questions about congressional authority to upset the federal-state balance.

Since the country's founding, the whole subject of domestic relations is uniquely a state's prerogative to regulate. *See supra* p. 21. Without a preexisting Indian family or parent-child relationship under state law, insufficient federal justification exists to supplant state laws on the subject of parent-child custody and adoption. As Judge Wald advised Congress, the government was "not convinced that Congress' power to control the incidents of [ICWA]

litigation involving nonreservation Indian children and parents pursuant to the Indian commerce clause is sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter." H.R. Rep. No. 95-1386, at 40. According to Judge Wald, "the Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power" by federal law in custody disputes. *Id.*

Judge Wald's comments were prescient. Congress passed ICWA to prevent the involuntary breakup of Indian families and removal of Indian children from their parents' custody based on illegitimate considerations such as prejudice or hostility to tribal culture. *Supra* pp. 39-42. But the state court's interpretation turns the foundational principles of the Act on their head by requiring the breakup of other families created by state law. The dubious constitutional validity of that enterprise strongly counsels against interpreting ICWA to seriously invade the States' control over domestic relations.

IV. ABSENT A PREEXISTING INDIAN FAMILY, A TRIBE CANNOT INVOKE SECTION 1915(a)

The state court interpreted Section 1915(a) to foreclose the adoption of an Indian child by non-Indian parents even where a sole-custodial non-Indian mother selects those parents and no other party—Indian or otherwise—seeks custody. The existing Indian family doctrine and the canon of constitutional avoidance preclude that result.

A. Section 1915(a) Requires a Preexisting Indian Family

The state court expressed the view that, regardless of Father's rights, Section 1915(a) prevents Adoptive Parents from adopting Baby Girl. Pet. App. 37a-39a. That provision states that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). Although Section 1915(a) may be "[t]he most important substantive requirement imposed on state courts," *Holyfield*, 390 U.S. at 36, it still requires a preexisting Indian family. Section 1915(a) means that "where possible, an Indian child should *remain* in the Indian community" to protect "the rights of the Indian community and tribe in *retaining* its children in its society." *Id.* at 36-37 (emphases added) (quoting H.R. Rep. No. 95-1386, at 23).

Like ICWA's other substantive provisions, Section 1915(a) does not authorize courts to create new Indian families. *E.g.*, *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at *16-17 (Tenn. Ct. App. Nov. 19, 1997). If ICWA does not create new custodial rights in biological parents, *supra* Part II, it would be passing strange to read ICWA as mandating Indian-placements in the absence of a preexisting Indian family. After all, a sole-custodial non-Indian mother could raise the child herself in a non-Indian home. *Supra* pp. 41-42.

The court faulted Adoptive Parents for not proving "the unavailability of suitable families for placement

after a diligent search has been completed for families meeting the preference criteria." Pet. App. 38a (quoting 44 Fed. Reg. at 67,594-95). The court also criticized Mother's selection of Adoptive Parents, stating that "[f]rom the outset, rather than to seek to place Baby Girl within a statutorily preferred home, Mother sought placement in an non-Indian home." *Id.* Finally, the court found Section 1915's good-cause exception was not satisfied even though Baby Girl had been raised for over two years by loving parents selected by Mother. What mattered more to the court was the *Tribe's* preference. *Id.* 38a-39a & n.31.

But ICWA does not permit tribes to manipulate *non*-Indian mothers, *non*-Indian adoptive parents, and children with *no* Indian connection other than blood. Congress could not have plausibly intended to require non-Indian mothers and adoptive parents to go searching for Indian adults to adopt their child, while at the same time stimulating the absentee father to embrace parenthood. *Id.* 26a. It is no wonder that respondents have maintained that mothers and adoptive parents should "rehabilitate" fathers and "diligently search" for Indian parents *before* the child is born.

Section 1912(a) affords tribes only ten days' notice before a custody hearing. In this case, the hearing took place *years* after Baby Girl's birth. If Congress had intended tribes to control the fundamental parenting choices made by mothers and prospective parents, ICWA would require notice to the tribe much earlier in the process and presumably while the mother is still pregnant. Moreover, had Father affirmatively consented to this adoption, the Tribe would not be entitled to any notice under Section

1912(a), which applies only to involuntary termination proceedings. It would be highly anomalous to read ICWA as requiring notice so the Tribe could invoke Section 1915(a) to insist on a preferential placement only when fathers have no rights under ICWA.

The upshot of the court's interpretation is a *de facto* ban on the interracial adoption of any child suspected of having Indian ancestry. That much was conceded by the Tribe's statement at oral argument that Adoptive Parents "would be the last people available to adopt this child." Pet. App. 96a (Kittredge, J., dissenting); *id.* ("That statement is chilling, for it demonstrates the tribe's lack of concern for the best interests of this unique child.").

B. At a Minimum, Section 1915(a) Applies Only When a Preferred Party Seeks Custody

The constitutional concerns raised by the court's construction of Section 1915(a) are even greater than those under Sections 1903(9) and 1912. The court's interpretation of Section 1915(a) raises the same equal protection, substantive due process, and federalism concerns discussed above. *Supra*, pp. 44-51. The court's interpretation also directly implicates the equal protection rights of non-Indian adoptive parents. *Palmore*, 466 U.S. at 431-32.

The canon of constitutional avoidance requires a limiting construction of Section 1915(a). As discussed, based on the Act's overall design and purpose, Congress did not intend the provision to apply absent an existing Indian family. Where, as here, the sole-custodial non-Indian mother voluntarily initiates an

adoption and selects the adoptive parents, Section 1915(a) does not apply.

At a minimum, a court may not invoke Section 1915(a) when no preferred party specified in the provision is before the family court. Tribes themselves have no right to adopt Indian children, *In re J.R.S.*, 690 P.2d 10, 17 (Alaska 1984), and the Tribe accordingly did not seek custody of Baby Girl. It is also irrelevant that Father's mother testified during the proceeding that she would have raised Baby Girl. JA 151. She did not seek custody. In the year and a half since Father and the Tribe received notice of the adoptive placement, no one else sought to adopt Baby Girl. Assuming Section 1912(d) and (f) did not apply to Father, Adoptive Parents were the only placement option. In other words, there was no preference to apply.

The family court never suggested that Section 1915(a) was relevant, much less an impediment to the adoption. The court could not have applied Section 1915(a) at all, let alone to determine whether "good cause" existed to place Baby Girl with Adoptive Parents rather than some alternative placement, such as Father's mother. The state supreme court therefore was wrong to conclude that the Tribe has an independent, free-floating right under ICWA to insist that Baby Girl be placed with someone other than Adoptive Parents.

* * *

Choices have consequences. When a biological father repudiates his parental rights and renounces his parental responsibilities, the pregnant mother must make a quick and deeply personal decision regarding if and how to raise her unborn child by

herself. States protect mothers by giving them the right to make those decisions without first notifying the men who abandoned them. And States protect children by requiring fathers to timely step forward or forever forfeit any right to object to the child's adoption by the caregivers who stepped forward in the father's absence to form a loving and stable family with the child. Yet the decision below "blames the birth mother and the adoptive couple—everyone except the Father, whose vanishing act triggered the adoption in the first instance." Pet. App. 42a (Kittredge, J., dissenting).

The notion that Congress intended the result in this case is misguided. Consistent with ICWA's purpose and history, the statutory text reaffirms again and again that the Act preserves existing Indian families and prevents the unwarranted removal of Indian children from custodial parents. Stretching ICWA to fit these facts will admittedly create more Indian families. But it will do so only at the cost of breaking up other families and of leaving abandoned Indian children to face uncertain and uniquely disadvantaged futures.

When Congress passed ICWA, it scarcely intended the Act to permit absent fathers or tribes to tear apart adoptive families in the sort of circumstances at issue here. In this case, that conclusion means that Baby Girl must be returned to her Adoptive Parents. But in a broader sense, a decision by this Court recognizing ICWA's limits means that loving adoptive families like Baby Girl and Adoptive Parents will not be broken up in the first place.

CONCLUSION

The decision below should be reversed and remanded with instructions that the adoption be approved under state law.

Respectfully submitted,

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APPENDIX

APPENDIX

INDIAN CHILD WELFARE ACT OF 1978

§ 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for

membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Subchapter I—Child Custody Proceedings

§ 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

§ 1912. Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of

counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

§ 1913. Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the

child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

§ 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child

was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of

preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§ 1916. Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

§ 1917. Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the

subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

§ 1918. Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by Title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance

as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

§ 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

§ 1920. Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly

removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

§ 1921. Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

§ 1922. Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the

child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

§ 1923. Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

FILED
MAR 21 2013
OFFICE OF THE CLERK

No. 12-399

In the Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, *ET AL.*,

Respondents.

On Writ of Certiorari to Supreme Court of South Carolina

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QUESTIONS PRESENTED

1. Whether an Indian child's biological father who has expressly acknowledged that he is the child's father and has established that he is the father through DNA testing is the child's "parent" within the meaning of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963.

2. Whether ICWA governs state proceedings to determine the custody of a minor who all parties concede to be an "Indian child" within the meaning of the Act.

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BRIEF FOR RESPONDENT BIRTH FATHER

STATEMENT

Congress enacted the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963, to address a crisis in the Nation's Indian communities, which had seen shockingly high numbers of Indian children being raised, not by their natural parents or families, but by non-Indian adoptive and foster parents. The magnitude of this problem was so great, in the congressional view, that it threatened the very survival of Indian Tribes. Congress responded by enacting ICWA, which created a range of specific substantive and procedural protections that govern *all* child custody disputes involving Indian children—among them, rules that require special showings by anyone seeking to terminate "the parent-child relationship" between an Indian child and his or her parent.

Application of these rules, according to their plain terms and the manifest congressional intent, resolves this case. It is conceded both that the little girl at the heart of this dispute—Baby Girl—is an "Indian child" within the meaning of ICWA and that this contested adoption is an ICWA "child custody proceeding." Respondent Father, Baby Girl's natural father, unquestionably is a "parent" protected by ICWA's guarantees against the termination of parental rights. And as we show below and as the Cherokee Nation and the United States demonstrate in their respective briefs, petitioners, the would-be adoptive parents, failed to satisfy a number of ICWA's requirements. Each of those failures is independently fatal to petitioners' attempted adoption.

But the intense emotional interest on each side of the case inevitably means that there is more to

discuss here than the technical terms of ICWA. Petitioners assert that "Father stepped in at the eleventh hour to block an adoption that was lawful and in the 'best interests' of Baby Girl." Pet. Br. 1. That statement is false and cannot go unchallenged. In fact, Father asserted his claim to raise his daughter literally the moment he was belatedly informed of the attempted adoption, which never would have gone forward at all had accurate information about Father and Baby Girl been provided to Oklahoma authorities and the Cherokee Nation. The South Carolina Family Court, after a four-day hearing at which it heard the testimony of all interested parties, held that awarding custody to Father was in Baby Girl's best interest because "the birth father is a fit and proper person to have custody of his child," who "has convinced me of his unwavering love for this child." Pet. App. 127a-128a. The South Carolina Supreme Court affirmed that factual determination in every respect. This Court should not disturb such a holding that allows a natural father to raise his daughter.

A. Statutory background.

1. As this Court has explained, ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes" of "the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32 (1989). More than "four years of congressional hearings, oversight, and investigation" identified an "Indian child welfare * * * crisis" (124 Cong. Rec. 38,101-02 (1978) (Rep. Udall)) in which an "alarmingly high percentage of Indian children, living within both urban communities and In-

dian reservations," were being raised "in foster or adoptive homes, usually with non-Indian families." S. Rep. No. 95-597, at 1 (1977). Experts estimated that "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Holyfield*, 490 U.S. at 32. Nationwide, the adoption rate for Indian children was eight times that for non-Indians, with 90% of these Indian children placed in non-Indian homes. H.R. Rep. No. 95-1386, at 9 (1978). See *Holyfield*, 490 U.S. at 33. There was substantial evidence that separation of these children from their Tribes and natural families often caused serious "social and psychological consequences" as the children got older. S. Rep. No. 95-597, at 43. See *Holyfield*, 490 U.S. at 50.

This crisis was exacerbated by what Congress described as state failure "to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). In Indian communities, it is common for a child to "have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." H.R. Rep. No. 95-1386, at 10 (1978). Many state social workers, however, "consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." *Ibid.*

Overall, witnesses termed "'the wholesale removal of Indian children from their homes[] . . . the most tragic aspect of Indian life today.'" *Holyfield*, 490 U.S. at 32. And while much of this testimony addressed "the harm to Indian parents and their children," "there was also considerable emphasis on the impact on the tribes themselves." *Id.* at 34. As this

evidence showed, when Indian children are not raised in Indian homes, "the tribes' ability to continue as self-governing communities" is "seriously undercut." *Ibid.* Congress accordingly concluded in legislative findings that, although "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" (25 U.S.C. § 1901(3)), "an alarmingly high percentage" of Indian children "are placed in non-Indian foster and adoptive homes and institutions." *Id.* § 1901(4).

2. Congress responded by enacting ICWA, which "'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'" *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23). The statute declares it "the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children." 25 U.S.C. § 1902. ICWA effectuates this goal by, among other things, setting "procedural and substantive standards for those child custody proceedings that do take place in state court." *Holyfield*, 490 U.S. at 36.

Thus, ICWA provides a range of protections for "parents" of "Indian children" who are involved in "child custody disputes." All of these terms are defined. As relevant here, a "parent" is "any biological parent * * * of an Indian child," excepting "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). An "Indian child" is "any unmarried person who is under eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian

tribe and is the biological child of a member of an Indian tribe." *Id.* § 1903(4). And "child custody proceeding" is broadly defined to include several specified types of action, including those leading to the "'termination of parental rights[,]' which shall mean any action resulting in the termination of the parent-child relationship." *Id.* § 1903(1)(ii).

For purposes of this litigation, two of ICWA's substantive parental protections are especially important. One is 25 U.S.C. § 1912(f), which provides that "[n]o termination of parental rights may be ordered in [an involuntary] proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt * * * that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The other is 25 U.S.C. § 1912(d), which declares that "[a]ny party seeking to effect a * * * termination of parental rights to[] an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."

In addition, ICWA provides Tribes a range of procedural and substantive protections (see *Holyfield*, 490 U.S. at 49), among them the right to intervene in child custody proceedings. And the statute specifies a hierarchy of preferences in the adoptive placement of Indian children, providing that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). See *id.* § 1903(2) (listing members

of extended family). These provisions collectively demonstrate "a Federal policy that, where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37 (quotation omitted).

B. Factual background.

This case involves a bitterly contested child custody dispute. Unsurprisingly, the parties and other participants offer very different accounts of the underlying facts. See, *e.g.*, Pet. App. 3a n.3, 4a n.4, 8a n.9. Our account generally follows that of the South Carolina Supreme Court majority and of the state Family Court, the latter of which took testimony and was in a position to assess the witnesses' credibility.[1]

1. Father, respondent here, and Mother are the biological parents of Baby Girl. Father is a registered member of respondent Cherokee Nation. Father and Mother were engaged at the time the child was conceived, while Father was serving in the United States Army and stationed at Fort Sill, Oklahoma. The Family Court found that Father "was excited to learn of the pregnancy and urged [Mother] to move the wedding date forward so the child would be born during their marriage. In that way, she and the unborn child would have military health coverage during and after the pregnancy, the family could obtain base housing, and his military pay would increase." Pet. App. 105a.

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[1] Baby Girl's Birth Mother has filed an *amicus* brief in this Court supporting petitioners. That brief makes factual assertions that are not supported by citations to, and are not grounded in, the record. See, *e.g.*, Br. *amica* Birth Mother 8-9. We note that in its preliminary bench ruling the Family Court repeatedly stated that it did "not find birth mother's testimony credible." Tr. of Record, Sept. 29, 2011, at 12-13.

In the months that followed, however, the relationship between the couple became strained. Mother lived in Bartlesville, Oklahoma, a four-hour drive from Fort Sill, and Father had few opportunities to visit her. Pet. App. 3a; Trial Tr. 480. In the past, the two had stayed in near-constant contact, often speaking by phone and sending each other text messages throughout the day. Trial Tr. 481. But that spring, Mother stopped answering Father's calls and did not respond to his text messages. Pet. App. 3a. In May, Father drove to Bartlesville to see Mother after obtaining a four-day pass, but she sent a text message refusing to see him; when he called at her home the next day she did not answer. Trial Tr. 483-484. On Father's return to Fort Sill he received another text message from Mother calling off their engagement. Pet. App. 3a; Trial Tr. 485. Although Father repeatedly attempted to speak with her, Mother refused to respond, choosing instead to "end[] all contact and communication between herself and [Father]." Pet. App. 105a.[2]

Father did not hear from Mother again until June 2009, when "Mother sent a text message to Father asking if he would rather pay child support or surrender parental rights." Pet. App. 4a. See also Trial Tr. 488. At first Father responded that he did not know what to do; he ultimately answered via text message that he would relinquish his rights, but testified that he believed he was "relinquishing his rights to Mother." Pet. App. 4a. See also Trial Tr.

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[2] This brief cites to the Family Court opinion that is reprinted in the sealed petition appendix. Although sealed below, the South Carolina Supreme Court has since unsealed the proceedings.

488. Father mistakenly thought that Mother was seeking full custody of Baby Girl and that by agreeing to relinquish his rights he was consenting to an arrangement similar to the one he had with his ex-wife, who had full custody of their daughter Kelsey. Trial Tr. 535-536. See also *id.* at 307. This agreement had allowed Father to maintain a strong relationship with Kelsey—as the Family Court found, the "undisputed testimony" showed that Father is a "loving and devoted father" to Kelsey (Pet. App. 126a)—without worrying about what might happen if he did not return from Iraq. Trial Tr. 562-563. In addition, Father still hoped that he and Mother might reconcile and believed that agreeing to this arrangement would further that end. *Id.* at 488-489.

During this exchange, "Mother never informed Father that she intended to place the baby up for adoption. Father insists that, had he known this, he would never have considered relinquishing his rights." Pet. App. 4a. As Father testified at trial:

> If I knew that * * * the adoption was going on, I would have said no, I wanted to keep my rights. And I would have fought then. I would have started right then and there. I would have went to military JAG and got a military lawyer and got started in the process of what I needed to do.

Trial Tr. 489. In fact, however, "[a]t approximately the same time [Mother] ended her relationship with [Father], she made the unilateral decision to give up the unborn child for adoption. [Father] had no knowledge of her plan." Pet. App. 105a. To the contrary, as described by the Family Court, "[a]ll attempts to contact [Mother] by [Father] and his family members were refused by [Mother]. * * * It was clear

that [Mother] wanted to have [Father] completely and permanently removed from her life and placing the child for adoption without his knowledge or consent would further this goal." *Id.* at 106a.[3]

Also in June 2009, Mother was introduced to petitioners, a couple living in South Carolina, through an Oklahoma adoption agency. Mother testified "that she knew 'from the beginning' that Father was a registered member of the Cherokee Nation, and that she deemed this information 'important' throughout the adoption process." Pet. App. 5a. Nevertheless, "it appears that there were some efforts to conceal [Father's] Indian status"; the adoption agency's preplacement form indicates that "'[i]t was determined that naming him would be detrimental to the adoption.'" Pet. App. 6a. Although Mother's attorney provided the Cherokee Nation with father's name while inquiring whether the child would be an "Indian child" subject to ICWA, the attorney misspelled Father's first name and provided both the wrong day and wrong year for Father's date of birth; based on these misstatements, the Cherokee Nation responded that the child appeared not to be an Indian child, adding that any misinformation would invalidate that determination. *Ibid.* Mother testified at trial that she knew the Cherokee Nation's determination could not be correct—and that she informed her attorney of that fact—but no further efforts were made

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[3] There was conflicting testimony on whether Father or his family attempted to contact Mother in the period before or immediately after Baby Girl's birth. See Pet. App. 8a & n.9.

to determine whether Baby Girl was an Indian child. Trial Tr. 311.[4]

Baby Girl was born on September 15, 2009. The next morning, Mother signed forms relinquishing her parental rights and consenting to the adoption by petitioners. Pet. App. 7a. At the time, petitioners were required to receive permission pursuant to the Interstate Compact on Placement of Children as a prerequisite to taking Baby Girl to South Carolina. The necessary forms, signed by Mother, "reported Baby Girl's ethnicity as 'Hispanic' instead of 'Native American.'" *Ibid.* Following submission of this misinformation, petitioners received permission to take Baby Girl to South Carolina. The misstatements were essential to the progress of the adoption: "Had the birth father's status as a member of the Cherokee Nation been known, neither the Cherokee Nation nor the Oklahoma ICPC agency would have consented to the removal of the child from Oklahoma." *Id.* at 107a. See also *id.* at 7a-8a & n.8.

Petitioners filed this adoption action in South Carolina on September 18, 2009, three days after Baby Girl's birth. But they failed to inform or serve Father for almost four months, waiting to notify him until "days before [he] was scheduled to deploy to Iraq." Pet. App. 8a. At that time, a process server presented Father with legal papers outside a mall

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[4] Denying "bad motives" in the misspelling of Father's name, petitioners make the unlikely assertion that Father himself repeatedly misspelled his own name. Pet. Br. 8 n.2. In fact, the bank checks petitioners identify containing the misspelling are cashier's checks on which Father's name was incorrectly typed by the bank. See JA 70-76. In any event, it is not us, but the South Carolina Supreme Court, that noted the "efforts to conceal [Father's] Indian status." Pet. App. 6a.

near his base stating "that [Father] was not contesting the adoption of Baby Girl." *Id.* at 8a-9a. Father agreed to sign, believing that would give Mother full custody of Baby Girl. Trial Tr. 489. Upon being told that Mother had relinquished her rights to petitioners, Father attempted to grab the documents, but the server told Father he would go to prison if he damaged the papers. *Id.* at 495. Father then immediately consulted with a JAG lawyer at his base, retained a personal attorney at the JAG lawyer's recommendation, sought a stay of the adoption proceeding pursuant to the Servicemember's Civil Relief Act, and began an action to establish paternity and obtain child custody. Pet. App. 9a. Within days of this development, Father "was deployed to Iraq where he served this country honorably during Operation Iraqi Freedom for a period of nearly one year." *Id.* at 108a. Meanwhile, the Cherokee Nation identified Father as a registered member and intervened in the South Carolina adoption action pursuant to ICWA. *Id.* at 10a.

The Family Court ordered paternity testing, which conclusively confirmed that Father is Baby Girl's biological father. Pet. App. 10a.

2. The Family Court appointed a guardian ad litem ("GAL") who has filed a brief in this Court that purports to be on behalf of Baby Girl and asserts that Baby Girl's interests would be best served by awarding custody to petitioners. GAL Br. 22. In fact, the GAL is not a neutral party. Although appointed by the Family Court, that court noted that the GAL and her attorney both "were unilaterally selected by [petitioners'] counsel" (Pet. App. 129a); the GAL had a continuing business relationship with petitioners' attorney, with whom she had worked frequently in

the past and who had already referred her multiple cases in 2009. Trial Tr. 591-592.

In this case, although the GAL had performed a comprehensive home study of petitioners, she resisted repeated requests from Father's attorney to conduct a home study of Father. Trial Tr. 619-621. When the GAL finally did conduct such a study, well over a year after her appointment and some five months after counsel's request, she informed Father and his family that "she knew the adoptive couple prior to the child being placed in their home" and "had worked with them before the child had been placed" (JA 113); that petitioners were a well-educated couple with a beautiful home, could afford to send Baby Girl to any private school that they chose and, when she was older, to any college she wanted; and that there was nothing that Baby Girl needed that petitioners could not buy for her. JA 146-147. The GAL therefore told Father's family that they "really need[ed] to get down on [their] knees and pray to God that [they] can make the right decision for this baby" (*id.* at 148), and they "needed to talk to God and pray about taking the child from the only family that she has known" (*id.* at 113). At trial, Father stated that the GAL treated him and his family as "a bunch of * * * rednecks that can't * * * afford anything, that we're not able to provide this child with proper education, schooling * * *. Pretty much that we weren't fit to love this child and raise her." Trial Tr. 514.

The GAL's initial report did not note Baby Girl's Native American heritage because the GAL thought that was "not something * * * the courts need to take into consideration." Trial Tr. 632. As for the GAL's view of Native American culture, she stated that the

advantages of having Native American heritage "include[ed] free lunches and free medical care and that they did have their little get togethers and their little dances." *Id.* at 634.

Given the GAL's obvious bias, respondents initially sought her removal. But rather than delay the proceedings, respondents ultimately withdrew this motion on the understanding that the Family Court would *not* consider either the GAL's conclusion regarding Baby Girl's best interests or the GAL's custody recommendation. See Pet. App. 51a n.44. Indeed, South Carolina law *precludes* a guardian ad litem in a private adoption from providing a custody recommendation unless one is requested by the court (see S.C. Code § 63-3-830(A)(6)); no such request was made here.

3. After holding a four-day hearing to resolve custody of Baby Girl, the Family Court determined that ICWA applied to the proceeding, rejecting petitioners' invocation of the so-called "existing Indian family" doctrine that, petitioners asserted, barred application of ICWA when the Indian child was not part of an "Indian family" at the time of the proceeding. Pet. App. 118a. The court went on to hold that Father meets ICWA's definition of "parent" because "he has both acknowledged paternity and paternity has been conclusively established in this action through DNA testing." *Id.* at 119a-120a. This meant that "the only way this adoption can be granted is if the [petitioners] prove grounds upon which [Father's] parental rights can be terminated [under South Carolina law], and prove that custody of the minor child with [Father] is likely to result in serious emotional or physical damage to the child [under ICWA]." *Id.* at 122a-123a.

The court found as a matter of fact that petitioners failed to prove either of those things. Pet. App. 123a-128a. The court noted that Father "is the father of another daughter" and that "[t]he undisputed testimony is that he is a loving and devoted father. Even [Birth Mother] herself testified that [Father] was a good father. There is no evidence to suggest that he would be anything other than an excellent parent to this child." *Id.* at 126a-127a. Accordingly, the court found that "the birth father is a fit and proper person to have custody of his child"; he "has demonstrated that he has the ability to parent effectively" and "has convinced me of his unwavering love for this child." *Id.* at 127a-128a.

The court concluded that, "[w]hen parental rights and the best interests of the child are in conflict, the best interests of the child must prevail. However, in this case I find no conflict between the two." Pet. App. 128a. The court added that, although petitioners had Baby Girl in their care for two years, "[w]hen this child was but four months old, [petitioners] knew her natural father wanted custody of his daughter and he was contesting the adoption both in Oklahoma and in South Carolina. However, they elected to pursue adoption over his objection. Custody and parental rights cannot be gained by adverse possession." *Ibid.*

The court accordingly denied the adoption and required petitioners to transfer Baby Girl to Father. The transfer took place on December 31, 2011. Pet. App. 2a. As of this writing, Baby Girl, now a three-year-old, has resided with Father in Oklahoma for more than a full year.

4. On appeal petitioners changed their approach, expressly waiving reliance on the "existing Indian

family doctrine" and disavowing any contention that ICWA is unconstitutional.[5] The South Carolina Supreme Court nevertheless affirmed. Pet. App. 1a-102a.

Although closely divided on other grounds, the court was unanimous in the view that the "existing Indian family" doctrine is invalid, "[g]iven that its policy conflicts with the express purpose of the ICWA"; the court noted that "we join the majority of our sister states who have rejected the EIF or have since abandoned the exception." Pet. App. 17a-18a n.17. Accord *id.* at 55a n.46 (Kittredge, J., dissenting). The court also was unanimous in rejecting petitioners' argument that, because South Carolina law did not require Father's consent to the adoption, he does not qualify as a "parent" under ICWA. The court explained that this argument "collapse[s] the notions of paternity and consent," and that "Father met the ICWA's definition of 'parent' by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establishing his paternity through DNA testing." *Id.* at 22a. Accord *id.* at 58a (Kittredge, J., dissenting).

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[5] Petitioners did not argue either point in their briefs to the South Carolina Supreme Court. When pressed at oral argument, petitioners' counsel stated: "I am not arguing the Existing Indian Family doctrine. Made a conscious decision." He then reiterated that "we are not advocating" the "Existing Indian Family doctrine" and, when asked whether he challenged the constitutionality of the Family Court decision, stated: "No, we abandon all those [arguments]. Conscious decision. Known relinquishment." Because the court below does not prepare a transcript, these statements were transcribed from an audio recording of the argument.

Having found that ICWA applies, the court held that "we may only grant [petitioners'] adoption decree with respect to Father in the absence of his voluntary consent if [petitioners] can establish grounds for involuntarily terminating Father's parental rights under state law *and* the ICWA." Pet. App. 25a. Like the Family Court, the South Carolina Supreme Court held that petitioners made neither showing. It first found there had been no effort to undertake the remedial measures required by 25 U.S.C. § 1912(d) prior to the termination of parental rights; the court held that "a finding on these facts that the remedial measures mandated by the ICWA may be waived would be an unwarranted substitution of this Court's preferences for the clear dictates of statutory law." *Id.* at 26a-27a. The court went on to rule that petitioners also "have not satisfied their burden of proving Father's custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt," as required by 25 U.S.C. § 1912(f), and that "we can only conclude from the evidence presented at trial that Father * * * and his family have created a safe, loving, and appropriate home for her." *Id.* at 29a, 32a.

Turning next to the state-law inquiry into the best interests of Baby Girl, the court observed that this question "is not *replaced* by ICWA's mandate," but that, "[w]here an Indian child's best interests are at stake, our inquiry into that child's best interests must also account for his or her status as an Indian," given that "ICWA is 'based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.'" Pet. App. 34a-35a (quoting *Holyfield*, 490 U.S. at 50 n.24). And here, "we cannot say that Baby Girl's best interests are not served by the grant of custody to

Father, as [petitioners] have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family." *Id.* at 36a-37a.

Although that was enough to resolve the case, the court also held in the alternative that, "even if we were to terminate Father's rights, section 1915(a) of the ICWA establishes a hierarchy of preferences for the adoptive placement of an Indian child." "The party seeking to deviate from the preferences bears the burden of demonstrating that good cause [to do so] exists." Pet. App. 37a-38a. And here, the court found as a fact that petitioners did not demonstrate "the basis for deviation from the statutory placement preferences." *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

There are some points in this case on which the parties agree. No one contests that Baby Girl is an "Indian child" and that this case is a "child custody proceeding" within the meaning of ICWA. Petitioners also do not dispute that, if ICWA precludes the termination of Father's parental rights, the adoption cannot go forward. In that circumstance, Father's parental rights will remain intact, he may assert his claim for custody of Baby Girl, and there would be no basis for setting aside the decisions of the state courts awarding Father custody under South Carolina law. Petitioners likewise appear to recognize that that the adoption cannot proceed if ICWA's preferential placement provision applies, which would offer an independent basis for affirming the decision below.

Against that background, the case presents two sets of questions. The first is whether Father is a

"parent" entitled to assert the protections that ICWA accords the parents of Indian children. The second is whether ICWA's language, or the "existing Indian family" policy that petitioners purport to find implicit in the statute, somehow precludes the application of ICWA's substantive limitations on the termination of parental rights (25 U.S.C. §§ 1912(d) and 1912(f)) and preferential placement guarantee (*id.* § 1915) in the circumstances of this case. Petitioners are wrong on each of these points.

I. Father is a "parent" within the meaning of ICWA and is entitled to invoke ICWA's protections against the termination of parental rights. Congress defined "parent" as "any biological parent * * * of an Indian child," excepting only an unwed father whose "paternity has not been acknowledged or established." It is undisputed that Father is Baby Girl's biological parent. He "acknowledged" his paternity by declaring that he is Baby Girl's father and bringing suit to establish that fact; he "established" it through a conclusive DNA test. That is precisely what the plain terms of the statute require. Petitioners' contrary contention, that ICWA's "parent" definition incorporates unexpressed state-law standards, is inconsistent with the statutory text, contrary to Congress' plain intent to adopt a federal definition, confuses the rules governing paternity and parental rights—and is unavailing even if correct, because Father also satisfies the relevant state-law paternity standard.

II. Invoking a version of the "existing Indian family" doctrine, petitioners insist that ICWA's provisions protecting parental rights apply only in cases where the parent invoking ICWA already had custody of the Indian child under state law. That is incor-

rect. ICWA's text makes no reference to any such doctrine, and the manifest congressional intent—apparent in the statutory language, structure, and background—precludes any such "pre-existing custody" requirement. Congress provided express statutory protections to all parents who had a legal relationship with an "Indian child"; sought to protect Tribes against the loss of their children, whether or not the children were in a "preexisting Indian family"; and protected Indian children themselves against what Congress identified as harmful adoptive placements outside Indian culture. All of these goals would be thwarted by petitioners' "existing Indian family" doctrine.

Petitioners also are wrong in arguing that Sections 1912(d) and 1912(f), the particular ICWA provisions at issue here that limit the termination of parental rights, have no application in this case. These provisions apply in every "child custody proceeding," which ICWA broadly defines to include any action that would terminate the "parent-child relationship." Section 1912(f) provides that "[n]o termination of parental rights may be ordered" absent a determination that "continued custody" of the child by the parent would harm the child, which in this context requires a showing that continuation of the parent-child legal relationship would cause injury. Petitioners concededly have not made such a showing here. By the same token, Section 1912(d) precludes termination of parental rights absent a demonstration that "active efforts have been made to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Petitioners also have failed to make this showing. For both of these reasons, petitioners cannot prevail.

III. The decision below also should be affirmed for the independent reason that petitioners' attempted adoption is precluded by the preferential placement provision of Section 1915, which requires that preference in the adoptive placement of an Indian child be given to specified parties. That concededly was not done here. Petitioners attempt to evade this failure by insisting that here, too, the "existing Indian family" doctrine applies. But that argument is utterly without textual support in ICWA, which by its terms contemplates application of Section 1915 when the child is not part of an existing Indian family.

IV. ICWA is constitutionally applied in the circumstances of this case.

First, so far as equal protection principles are concerned, the distinction petitioners would draw between application of ICWA to custodial and noncustodial parents is chimerical; in both cases, Congress properly acted on the basis of sovereignty rather than race to bolster Tribes as political entities.

Second, application of ICWA does not "upset the federal-state balance," given Congress' plenary power with respect to Indian Tribes and the extensive findings Congress made on the need for ICWA's protections.

Third, the Court has never recognized extravagant substantive due process rights of the sort petitioners and the GAL assert on behalf of the Birth Mother and Baby Girl. The Constitution does not preclude application of ICWA according to its plain terms.

ARGUMENT

I. AN UNDISPUTED BIOLOGICAL FATHER WHO HAS BOTH EXPRESSLY ACKNOWLEDGED AND CONCLUSIVELY PROVED PATERNITY OF AN INDIAN CHILD IS A "PARENT" UNDER ICWA.

Petitioners first assert that Father is not a "parent" entitled to invoke ICWA's protections against the termination of parental rights because "[t]he word parent 'describes a legal status' that 'requires a reference to the law of the State which create[s] these relationships.'" Pet. Br. 20. But in the circumstances here, that proposition is self-evidently incorrect. In ICWA, Congress gave "parent" a specific, factual meaning: a "parent" is "any biological parent * * * of an Indian child or any Indian person who has lawfully adopted an Indian child," excepting only "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). And while it doubtless is true that "Congress passed ICWA with the understanding that 'a biological parent is not *necessarily* a child's parent under law'" (Pet. Br. 24 (citation omitted; emphasis added)), that is exactly what Congress said a parent *is under ICWA*.

1. Petitioners concede that Father is Baby Girl's biological father. As for the remainder of ICWA's "parent" definition, the words "acknowledge" and "establish" had an ordinary and unambiguous meaning when ICWA was enacted, just as they do today. To "acknowledge" is "to show by word or deed that one has knowledge of and agrees to (a fact or truth)"; to "establish" is "to prove or make acceptable beyond a reasonable doubt" or "to provide strong evidence for: bring unavoidably to the attention." Webster's Third

New International Dictionary 17, 778 (1981). Thus, in the particular circumstances here, an unwed father must make an "avowal or admission that the child is [his] own" or act "[t]o settle * * * [or] prove" his paternity. Black's Law Dictionary 21, 490 (5th ed. 1979) (definitions of "acknowledge" and "establish"). That is precisely what Father has done. As the court below explained, Father at all times stated that he is Baby Girl's father and promptly contested Baby Girl's adoption (thus "acknowledging" paternity); he submitted to a genetic test that conclusively proved he is the natural father (thus "establishing" it). See Pet. App. 20a-22a, 58a. See also *Bruce L.* v. *W.E.*, 247 P.3d 966, 979 (Alaska 2011). That is enough to settle the matter.

It may be added that there is no doubt what it means to acknowledge or establish "paternity"; in 1978 "paternity" ordinarily was understood to mean the simple biological fact of fatherhood, as it does today. Paternity is "[t]he quality or state of being a father" or "origin or descent from a father: male parentage." Webster's Third New International Dictionary 1654 (1981). See Black's Law Dictionary 1014 (5th ed. 1979) ("paternity" is "the state or condition of a father"); *id.* at 547 (defining "father" to mean "[h]e by whom a child is begotten. Natural father, procreative of a child."). That is what Father acknowledged and established.

Petitioners offer a single textual response: that, "[b]ecause the first sentence [of Section 1903(9)] already covers an unwed father whose biological link is acknowledged or established, the canon against superfluity counsels reading the second sentence to require more than a proven biological connection." Pet. Br. 22-23. But as the United States shows (U.S. Br.

17-18), this contention misses the statutory point. The provision's second sentence excludes certain biological fathers from the definition, thus relieving a court of the need to identify the father where paternity has not been acknowledged or established, which the court otherwise would have to do to comply with various ICWA procedural requirements. U.S. Br. 18.

The second sentence also sets out the steps necessary to demonstrate paternity in an era when definitive DNA testing was unavailable. The language of "acknowledge" and "establish" was generally used at the time of ICWA's enactment to describe methods of proving paternity—by, for example, executing a writing acknowledging parentage. See, *e.g.*, Uniform Parentage Act §§ 3(2), 4(a)(5), 12 (1973) ("the natural father may be established under this Act"; a man is presumed to be the natural father of a child if "he acknowledges his paternity of the child in a writing" filed with the appropriate court or agency that the mother does not dispute; evidence "[r]elating to [p]aternity" includes scientific evidence and "all other evidence relevant to the issue of paternity of the child"). There can be no doubt that steps of this sort to show the *fact* of paternity, and not a veiled reference to unstated state-law standards, is what Congress intended in ICWA.[6]

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[6] Petitioners are wrong to rely on the House Report's statement that ICWA was "not meant to conflict with the decision of the Supreme Court in *Stanley*" v. *Illinois*, 405 U.S. 645 (1972), for the proposition that Congress chose not to disturb "the State's inherent police power to limit an unwed father's rights when he has not formed a relationship with his child." Pet. Br. 27 (citing H.R. Rep. No. 95-1386, at 21). *Stanley* recognized *expanded* constitutional protections for unwed fa-

2. Even if the statutory text left room for doubt on this question, the structure and policy of ICWA make clear that Congress did not intend the application of the statute's "parent" definition to be governed by state law, for reasons the Court addressed at some length in *Holyfield*.

The Court there noted as a general matter "that 'in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Holyfield*, 490 U.S. at 43. And here, in particular, "the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term" *Id.* at 44. Quite the contrary: "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities," and it "perceived the States and their courts as partly responsible for the problem it intended to correct. * * * Under these circumstances, it is most improbable that Congress would have intended to leave the scope of" a key provision "subject to definition by state courts as a matter of state law." *Id.* at 44-45. As the United States shows (U.S. Br. 16), this principle actually applies with greater force in this case than in *Holyfield* because, although Con-

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thers; the report language invoked by petitioners shows only that Congress did not depart from *Stanley* by categorically *denying* rights to unwed fathers. The other decisions of this Court addressing the constitutional rights of unwed fathers that are cited by petitioners (see *id.* at 25, 27), which were not mentioned by Congress or post-dated ICWA's enactment altogether, have no bearing here.

gress did not define the term at issue in *Holyfield* ("domicile"), it did define "parent."[7]

Moreover, "a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind." *Holyfield*, 490 U.S. at 46. Yet defining "parent" by looking to state adoption-consent law, as petitioners advocate, would transform ICWA into an unworkable "patchwork plan." *NLRB* v. *Hearst Publ'ns, Inc.*, 322 U.S. 111, 123 (1944). At the time that Congress enacted ICWA, state adoption-consent laws varied dramatically. See generally *Aslin* v. *Seamon*, 587 P.2d 875, 878-879 (Kan. 1978) (collecting state laws on consent to adoption by the father of an illegitimate child); Br. for Resp't at 50, *Stanley* v. *Ill.*, 405 U.S. 645 (1972) (No. 70-5014), 1971 WL 126678 (same). Some States required the unwed father's consent only if he had established paternity according to the jurisdiction's own laws; others if he had established paternity under the laws of *any* jurisdiction; and still others required him both to acknowledge paternity and to legitimate the child. Others did not require his consent under any circum-

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[7] In fact, "had Congress intended a state-law definition," "it would have said so," as it did elsewhere in ICWA. *Holyfield*, 490 U.S. at 47 n.22. Indeed, in another statute passed one year after ICWA, Congress defined "parent" to mean "biological or adoptive parents or legal guardians, *as determined by applicable State law*." Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 475(2), 94 Stat. 500, 510 (emphasis added). It pointedly imposed no such condition in ICWA.

stances at all.[8] The Congress that recognized "the failure of state officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and * * * Indian tribe[s]" (H. Rep. No. 95-1386, at 19) could not have intended ICWA to apply in this manner.[9]

3. Finally, as the United States also correctly notes (U.S. Br. 17), Father would qualify as an ICWA "parent" even if state law did govern. The DNA test that Father took is sufficient to "establish * * * paternity" in South Carolina. S.C. Code § 63-17-10(C); see *id.* § 63-17-30(A). Petitioners' contrary argument rests on a basic misunderstanding of state law. Rather than look to South Carolina law on *paternity*, they argue that ICWA's definition of parent incorporates state law governing *adoption rights*. But as every member of the South Carolina Supreme Court

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[8] These laws were declared unconstitutional in 1979, after ICWA's enactment. See *Caban* v. *Mohammed*, 441 U.S. 380 (1979).

[9] Petitioners complain that "'paternity as a factual matter' is nothing more than a biological standard that would sweep in sperm donors and rapists." Pet. Br. 28. But the possibility of imagining aberrational cases that Congress surely did not contemplate—and that evidently have never arisen during the 35 years that ICWA has been in force—cannot dictate the meaning of the statute. Indeed, in the case of rapists, some States have found it necessary specifically to limit their parental rights. See, *e.g.*, 750 Ill. Comp. Stat. Ann. 50/8(a)(5); S.D. Codified Laws § 25-4A-20; Tex. Fam. Code Ann. § 161.007. Congress is fully capable of doing likewise if that proves necessary in practice under ICWA. But "[i]t is not the function of the courts to amend statutes under the guise of 'statutory interpretation.'" *Fedorenko* v. *United States*, 449 U.S. 490, 513 n.35 (1981).

observed, this contention improperly "collapse[s] the notions of paternity and consent." Pet. App. 22a. See *id.* at 58a (Kittridge, J., dissenting) ("The issues of paternity and whether one's consent is required in an adoption proceeding are separate questions.").

Every other state court of last resort that has looked to state law in applying Section 1903(9) likewise has invoked state procedures for acknowledging and establishing paternity, as ICWA's plain terms dictate. See *Bruce L.*, 247 P.3d at 979; *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 934 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 n.18 (Okla. 1985). There accordingly is no doubt: Father is a "parent" under ICWA.

II. THE "EXISTING INDIAN FAMILY DOCTRINE" HAS NO BASIS IN ICWA.

Petitioners' other argument rests on the "existing Indian family" doctrine, under which, they say, ICWA may be applied only "to preserve a preexisting Indian family." Pet. Br. 30. It is not entirely clear what petitioners mean by this. The words "preexisting Indian family" do not appear in, and of course are not defined by, ICWA; the doctrine is an extratextual rule created by a handful of state-court judges.

And petitioners themselves have been unable to decide on the basis for their theory, which they have now articulated in four quite different ways during the course of this litigation. Before the Family Court they did not identify *any* textual basis for the doctrine in ICWA, instead contending that Father's "connection to the Cherokee Nation is in name only" and that "[i]n the absence of a strong cultural tie to the Cherokee Nation, the application of ICWA to this

case is unconstitutional." Pl. Post-Trial Br. 11. Before the South Carolina Supreme Court, petitioners changed course and disclaimed *any* reliance on the doctrine at all. See page 15, *supra*. In their certiorari petition to this Court, petitioners resurrected their invocation of the doctrine but grounded it in 25 U.S.C. § 1912(f). See Pet. 25. And in their merits brief, petitioners now expressly disavow their original "not Indian enough" theory—"we make no such argument that questions Father's tribal ties" (Pet. Br. 41)—but for the first time assert that the doctrine rests on a *half-dozen* ICWA provisions. *Id.* at 30-39. This prior disavowal of and failure to articulate their current position suggests the Court should view it with skepticism.

But petitioners' theory is, in any event, wrong on its own terms. Although the scope of their proposed rule is obscure, petitioners appear to contend, at a minimum, that neither a parent nor a Tribe may invoke ICWA when the Indian child who is the subject of a proceeding to terminate parental rights is currently in the state-law custody of a non-Indian. See, *e.g.*, Pet. Br. 29, 51-52. As a consequence, they insist that the ICWA provisions establishing standards for the termination of parental rights and preferences for the adoptive placement of Indian children—as relevant here, Sections 1912(d) and (f), and 1915(a)—have no application in this case. This contention, however, is utterly inconsistent with the central goals and plain text of ICWA. The court below correctly held that each of these provisions applies and bars the termination of Father's parental rights.

A. ICWA governs all child custody disputes involving Indian children.

Petitioners maintain that, when an Indian child is in the state-law custody of a non-Indian who seeks to place the child for adoption, "ICWA's purpose to prevent the unwarranted removal of Indian children and the continuation of their existing Indian ties is not implicated." Pet. Br. 39-40. They then use this proposition as the foundation for their further assertion that *none* of ICWA's provisions apply in these circumstances. But for several fundamental reasons, that assertion cannot be reconciled with ICWA's express statutory declaration of purpose to protect Indian parents, Tribes, and children.

1. At the outset, Congress very plainly did not intend to confine its protection of parental rights, the subject of proceedings involving Sections 1912(d) and 1912(f), to those parents who have state-law custody of the child at the time of the proceeding. To the contrary, Congress took extraordinary steps in ICWA to protect *all* parent-child relationships. ICWA's definition of "child custody proceeding," a term that is central to the statute's application, therefore broadly includes proceedings directed at the "termination of parental rights," which in turn is defined in the most inclusive terms to "mean any action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(1)(ii).

In writing this language, Congress quite consciously moved beyond limited state-law custody concepts, addressing ICWA to *all* proceedings that would alter the legal relationship between parent and child. In its original form, the Senate bill that became ICWA placed heavy emphasis on legal custody, using the term "child placement" to describe what

ultimately became "child custody proceeding" and defining "child placement" as:

> [A]ny proceedings * * * under which an Indian child is removed by a nontribal public or private agency from (1) the *legal custody* of his parent or parents, (2) the *custody* of any extended family member in whose care he has been left by his parent or parents, or (3) the *custody* of any extended family member who otherwise has custody in accordance with Indian law or custom, or (4) under which the parental or *custodial* rights of any of the above mentioned persons are impaired.

S. 1214, 95th Cong. § 4(h) (1977) (emphases added). See also H.R. 12,533, 95th Cong. § 4(9) (1978) (defining "placement" as "any action resulting in the removal of an Indian child from the *custody* of his or her parent or Indian custodian where such removal results in the loss by such parent or Indian custodian *of the unconditional right to regain custody* upon demand") (emphasis added). But as enacted, all of this language of "legal custody" was omitted; ICWA's definition of "child custody proceeding" makes no reference to "custody" at all.

Unsurprisingly, many provisions of ICWA therefore confer rights on parents wholly without regard to the existence of state-law custody—or, for that matter, of what petitioners label a "preexisting Indian family." These include the parent's right to petition to move a proceeding for termination of parental rights from state to tribal court (25 U.S.C. § 1911(b)); to notice of such a proceeding (*id.* § 1912(a)); and to appointment of counsel in such a proceeding if indigent (*id.* § 1912(b)). ICWA also gives parents special protections relating to the voluntary termination of

parental rights and to voluntary adoption (*id.* § 1913(a), (c), and (d)), even though, as in this case, the children involved in such actions may never live with, let alone be in the legal custody of, the biological parents. And as we have shown, Congress took pains to include unwed fathers within ICWA's definition of "parent," even though some of these fathers will not have custody of their children under state law. See Pet. Br. 33 n.4. Congress would not have given non-custodial parents these rights had it not meant to entitle such parents to invoke the full range of ICWA protections.

There is no mystery why Congress took this expansive approach to the protection of parental rights: among the principal abuses that prompted the enactment of ICWA were attempts to strip parental rights from non-custodial parents, such as those whose children had been placed in temporary foster care. See, *e.g.*, H.R. Rep. No. 95-1386, at 11 (addressing typical example of an Indian parent who "was persuaded to sign a waiver granting temporary custody to the State, only to find that this is now being advanced as evidence of neglect and grounds for the permanent termination of parental rights"). Yet petitioners' reading would exclude all of those cases from the statute's scope, while also making ICWA inapplicable to a wide range of non-custodial parents who wish to avoid "termination of parental rights"—such as, to name just a few, divorced parents who have only visitation rights and virtually all unwed fathers. Congress could not have intended a statute broadly designed to protect parental rights to have such a result.

2. Petitioners' attempt to hinge application of ICWA on the child's current status as a member of

an "existing Indian family" also wholly ignores the tribal interest that underlies the statute. In enacting ICWA, Congress emphasized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). This Court therefore has recognized that ICWA "'seeks to protect the * * * rights of the Indian community and tribe in retaining its children in its society.'" *Holyfield*, 490 U.S. at 37. This background leaves no doubt that "Congress was concerned not solely with the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Id.* at 49. As the Court continued, "[t]he numerous prerogatives accorded the tribes through ICWA's substantive provisions * * * must, accordingly, be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." *Ibid.* These prerogatives include a litany of provisions that give Tribes the right to participate in ICWA child custody proceedings. See *ibid.* (citing provisions).

Not one of these provisions is conditioned on the Indian child being in the custody of an Indian parent or part of a "preexisting Indian family" at the time of the ICWA child custody proceeding. The reason is obvious: the goal of assisting Tribes "in retaining [their] children in * * * society" and limiting "the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians" is in no way limited to children who are in the legal custody of an Indian at the time of the child custody proceeding. The threat to the survival of Tribes from "being drained of their children" (124 Cong. Rec. 38,102 (1978) (Rep. Udall)) is no less serious simply because

the child's biological parent does not have custody at the time of the adoptive placement. Petitioners' invocation of the "existing Indian family" doctrine would largely read this policy out of the statute.[10]

It is no answer to this point that Birth Mother could have chosen not to "expose[] the child to an Indian culture" had she retained custody and raised Baby Girl herself. Pet. Br. 41-42. For obvious reasons, Congress did not attempt to dictate how natural parents raise their *own* children, whether those parents are Indian or not, just as it chose not to address the award of custody as between divorcing parents. 25 U.S.C. § 1903(1). But when Birth Mother chose *not* to raise Baby Girl, the question became what considerations determine who will get custody, as between non-Indians who had no prior connection to the child and Baby Girl's Indian natural father. Congress determined *that* choice should be guided by the significant tribal and federal interest in "the future and integrity of Indian tribes and Indian families." 124 Cong. Rec. 38,102 (1978) (Rep. Udall).

3. In addition, petitioners entirely ignore the Indian child's own interest. Petitioners think it immaterial to an Indian child whether he or she is raised in an Indian environment because, in a case like this one, "the continuation of their existing Indian ties is not implicated." Pet. Br. 39-40. But Congress was of a very different view. As the Court explained in *Holyfield*, "it is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental im-

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[10] Petitioners do not, and could not, contend that ICWA is limited to children domiciled on a reservation. See, *e.g.*, 25 U.S.C. § 1911(b); *Holyfield*, 490 U.S. at 36.

pact on the children themselves of such placements outside their culture." 490 U.S. at 49-50. "Thus, the conclusion seems justified that * * * '[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.'" *Id.* at 50 n.24.

That view is plain from the statutory text. "Indian child" is defined as an unmarried person under the age of 18 who "is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). That ICWA governs custody proceedings concerning children who are *eligible* for tribal membership makes apparent that Congress extended ICWA's protections to children who have not yet formed their Indian identities. And this, too, was a well-considered choice. The Department of Justice had objected to defining "Indian child" as including a child "who is merely eligible for membership * * * [and] is lodged exclusively with nontribal members," proposing that the definition be limited to a child who is "eligible for membership in an Indian tribe and is *in the custody of a parent who is a member of an Indian tribe.*" H.R. Rep. No. 95-1386, at 39 (emphasis added). But Congress expressly rejected the change, declaring that, regardless of who has custody of the child at the time of the ICWA proceeding, any child who is eligible for tribal membership and whose biological parent is a tribal member has a "right to share in the cultural and property benefits of an Indian tribe." *Id.* at 20. It therefore could not be plainer that Congress wanted the provisions of ICWA applied even to Indian children who were *not* in the state-law custody of an Indian parent at the time of the "child custody proceeding." For this reason as well, the "existing Indian family" doctrine

cannot be squared with ICWA's language and purpose.

4. Against this background, it is not surprising that petitioners' position cannot be reconciled with this Court's decision in *Holyfield*, with the views of most state courts, and with subsequent congressional action.

In *Holyfield*, an Indian couple took pains to ensure that their twins would not be born on a reservation and, immediately after birth, the biological parents "'voluntarily surrendered and legally abandoned'" the children to non-Indian adoptive parents. Those acts led a state court to conclude (as petitioners argue here) "that, for this reason, *none* of the provisions of the ICWA was applicable." *Holyfield*, 490 U.S. at 40. This Court reversed. Although the specific holding of *Holyfield* was that the twins were domiciliaries of the reservation and therefore subject to tribal jurisdiction (see *id.* at 43-54), the Court's broader rationale dooms petitioners' case. The twins, who were legally abandoned by their parents virtually at birth, were not in the custody of Indian parents at the time of the "child custody proceeding." Had it not been for ICWA's application the twins would never have been raised in an Indian environment; far more than in this case, application of ICWA in *Holyfield* would, in petitioners' terms, "create a new Indian family." Pet. Br. 41.[11] Yet this Court held

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[11] In *Holyfield* no Indian family members sought custody; the Tribe intervened to have the adoption set aside on the ground that the tribal court had exclusive jurisdiction over the proceeding. 490 U.S. at 38-40. Here, of course, Baby Girl has an Indian father who seeks custody. As it happens, after the Tribe prevailed in this Court, the tribal court in *Holyfield* found it in the children's best interest for the non-

ICWA to apply, invoking Congress' goal to protect both Tribes and Indian children (see 490 U.S. at 49-50)—and offering no suggestion that the lack of an "existing Indian family" had any relevance.

Moreover, those state courts that have addressed the "existing Indian family doctrine" have rejected it overwhelmingly.[12] A half dozen state legislatures have as well.[13]

And acting almost twenty years after ICWA's enactment, the Senate Committee on Indian Affairs, by a vote of 14-1, rejected a proposal to adopt the "existing Indian family" doctrine "because it had great potential for harm to Indian children, to Indian families, and to fundamental principles of Federal-tribal relations and tribal sovereignty," and "[a]t the very

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Indian adoptive mother to retain custody. See Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 Cap. U.L. Rev. 239, 279 (2008).

[12] See *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of T.N.F.*, 781 P.2d 973, 978 (Alaska 1989); *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832, 840 (Ill. App. Ct. 1993); *Quinn* v. *Walters*, 845 P.2d 206, 208 (Or. Ct. App. 1993) (en banc); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 515 (Mont. 1996); *State ex rel. D.A.C.*, 933 P.2d 993, 998 (Utah Ct. App. 1997); *Michael J., Jr.* v. *Michael J., Sr.*, 7 P.3d 960, 964 (Ariz. Ct. App. 2000); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 324 (N.Y. App. Div. 2005); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re A.J.S.*, 204 P.3d 543, 547 (Kan. 2009).

[13] See Okla. Stat. tit. 10 §§ 40.1, 40.3; Iowa Code Ann. § 232B.5; Cal. Welf. & Inst. Code § 224(c); Minn. Stat. Ann. § 260.771; Wash. Rev. Code § 13.34.040(3); Wis. Stat. Ann. § 938.028(3)(a).

least * * * would have caused an explosion of litigation and disrupted tribal and State child welfare systems." S. Rep. No. 104-335, at 14 (1996). In doing so, the Committee made clear that the doctrine "is completely contrary to the entire purpose of ICWA," which "recognizes that the Federal trust responsibility and the role of Indian tribes as parens patriae extend to all Indian children involved in all child custody proceedings." *Ibid.* Accordingly, "[w]hen the ICWA was enacted, * * * Congress intended * * * to provide for tribal involvement with, and Federal protections for, all children defined by their tribes as members or eligible for membership who are involved in any child custody proceeding, regardless of their individual circumstances." *Ibid.* This determination, the Committee concluded, "should be construed as a rejection of 'existing Indian family exception' doctrine in all of its manifestations." *Ibid.*[14]

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[14] The GAL asserts that in 1987 the Senate Committee on Indian Affairs rejected a proposed amendment that would have disapproved state-court decisions applying the "existing Indian family" doctrine. GAL 45-46. That is not entirely accurate. The language identified by the GAL was part of a much larger bill that would have amended ICWA in numerous significant and controversial ways. S. 1976, 100th Cong., 1st Sess. (1987). Although much congressional criticism was directed at these other provisions, we have been unable to identify any challenge in the legislative record to the language discussed by the GAL. In this context, rejection of the broader bill sheds no light on Congress' view regarding the "existing Indian family" doctrine.

B. Non-custodial parents may invoke ICWA provisions limiting the termination of parental rights.

Against all this, petitioners purport to defend the "existing Indian family" doctrine on textual grounds, asserting that 25 U.S.C. §§ 1912(d) and 1912(f)—the provisions applied by the court below to preclude the termination of Father's parental rights—"apply only when the objecting parent seeks to preserve a preexisting Indian family." Pet. Br. 30. Petitioners are wrong: their argument misreads the plain statutory text.

1. Petitioners spend the most time arguing that Section 1912(f) does not apply. That provision states:

> No termination of parental rights may be ordered in [an involuntary child custody] proceeding in the absence of a determination * * * that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Petitioners rely centrally on the phrase "continued custody," and reason as follows: A court applying Section 1912(f) "requires prospective adoptive parents to show that the 'continued custody' by the objecting parent would seriously harm the child"; "custody must already exist before it can be 'continued'"; and "[i]t necessarily follows that Congress did not intend noncustodial parents such as Father to invoke Section 1912(f)'s heightened protections." Pet. Br. 33-35.

But that, very simply, is not what the statute says. Section 1912(f) nowhere states affirmatively that it is inapplicable to non-custodial parents. In-

stead, the statute's plain terms provide that parental rights may not be terminated "in the absence of a determination" that "continued custody" by the parent would injure the child. If petitioners are correct that such a determination of likely harm categorically cannot be made when the parent whose rights will be terminated currently lacks state-law custody, the necessary consequence is *not* that Section 1912(f) becomes inapplicable to the proceeding; it is, as Congress expressly put it, that "[n]o termination of parental rights may be ordered." After all, it surely is more likely that Congress intended Section 1912(f) to be applied according to its literal terms than that the drafters sought to make a central provision of ICWA inapplicable to all non-custodial parents in the backhanded and exceedingly indirect manner proposed by petitioners. As the Court has noted more than once, Congress "does not * * * hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

And that is especially so because our reading is in fact fully in accord with the congressional language and purpose. As we have noted, ICWA's definition of "child custody proceeding" includes any proceeding involving the "termination of parental rights." Such a termination—the subject of Section 1912(f)—is *any* action that would terminate the "parent-child relationship," and therefore addresses a far wider range of relationships than simply that of child and current legal custodian. Thus, Rep. Udall, chief House sponsor of ICWA, explained that "termination of parental rights" is an "action[] affecting parental, not custodial rights." 124 Cong. Rec. 38,103 (Oct. 14, 1978).

Here, too, the point is confirmed by the evolution of the statutory text: What ICWA now refers to as an "involuntary proceeding" to terminate "parental rights" subject to Section 1912(f), the initial Senate bill described as a proceeding "where the natural parent or parents of an Indian child * * * *opposes the loss of custody*." S. 1214, 95th Cong. § 101(b) (1977) (emphasis added). But as enacted, Section 1912(f) addresses any proceeding that would terminate the "parent-child relationship." Congress therefore plainly understood that, for ICWA purposes, "custody" includes *all* parent-child legal relationships, including those that do not currently involve the exercise of legal custody. Against this background, there is every reason to believe that Congress wanted Section 1912(f) to preclude termination of parental rights in this broad sense absent a showing that continuation of the *parent-child legal relationship* would injure the child.[15]

The United States, which agrees with petitioners on their reading of Section 1912(f) (although on nothing else, see U.S. Br. 23-26), adds nothing to their analysis. It, too, focuses exclusively on the phrase "continued custody" and takes no account of the operative language of the provision, which precludes

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[15] Petitioners assert that "[t]he text [of Section 1912(f)] plainly presupposes that absent termination of parental rights, the child will continue in the custody of the objecting parent." Pet. Br. 33. It doubtless ordinarily is the case that a natural parent who prevails in a Section 1912(f) proceeding will be awarded custody under state or tribal law. But that is not necessarily so, if the parent is for some reason unfit. In such a case, custody would be determined by application of ICWA's other provisions (including the placement preferences of Section 1915) and, where applicable, state law.

termination of parental rights in the broadest sense unless the requisite showing of harm can be made. And when the United States says that Congress would not have wanted Section 1912(f)'s test to apply except "where the parent has already had *some form of custody* that would be maintained or restored after an interruption" (U.S. Br. 25 (emphasis added)), it fails to recognize that Congress defined "child custody proceeding" to include proceedings involving a broader range of parent-child relationships than those limited to state-law physical and legal custody, and therefore would have used "custody" in Section 1912(f) to refer to the parent-child relationship in this broader sense.[16]

It may be added, however, that even if petitioners are correct that the question here is whether Father's "continued" legal and physical custody would cause harm to Baby Girl, they are wrong in contending that it is impossible to "marshal the facts to fit the statutory language." Pet. Br. 34. As the definitions of "continued" offered by petitioners and the United States—"carried on or kept up without cessation" (*id.* at 33) and "stretching out in time and space" (U.S. Br. 24)—themselves suggest, the word has a primarily prospective meaning, as does the

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[16] The United States is incorrect in finding support for its reading of "continued custody" in the BIA guidelines, which refer to the inquiry whether "'it is dangerous for the child to remain with his or her *present* custodians.'" U.S. Br. 24 n.5 (citation omitted; emphasis added). If the government's reading of "custody" is correct, the inquiry cannot be limited to "present" custodians; the United States itself recognizes that Section 1912(f) must apply, at least, to parents who had custody in the past that would be "restored after an interruption." *Id.* at 25.

phrase with which it is linked in Section 1912(f), "likely to result in." Even on petitioners' reading, then, the question for a court in a case under Section 1912(f) is whether a custodial relationship with the parent is likely to result in harm to the child. And as the detailed analysis offered by both courts below demonstrates, it is entirely possible to determine from the record that a currently noncustodial father will be "an excellent parent of his child." Pet. App. 127a.[17]

2. Petitioners also are wrong in declaring that the "existing Indian family" doctrine is incorporated in 25 U.S.C. § 1912(d), which provides that a party seeking to terminate parental rights must "satisfy the court that active efforts have been made * * * to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Here, the South Carolina Supreme Court correctly found that *no* efforts were made to prevent the breakup of the Indian family; petitioners did not contend otherwise. Pet. App. 26a. (Had such efforts been made, they surely would have proved successful, given Father's immediate assertion of custody when he learned of the planned adoption.) As the United States demonstrates (U.S. Br. 20-23), petitioners accordingly did

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[17] Petitioners criticize the South Carolina Supreme Court for looking to the possibility of harm resulting from the "transferee parent's prospective legal and physical custody." Pet. Br. 34 (quoting Pet. App. 32a). In fact, the court below was there rejecting petitioners' own assertion that the court should "find severe emotional harm likely based solely on the expected harm" *of removing Baby Girl from petitioners.* Pet. App. 31a. Petitioners now appear to have abandoned that argument, replacing it with reliance on the "existing Indian family" doctrine.

not (and could not) satisfy the courts below that the requisite "active efforts" were made and "proved unsuccessful." Section 1912(d), by its plain terms, therefore preludes termination of Father's parental rights.

Petitioners nevertheless insist that "[t]his provision cannot be applied to noncustodial parents consistent with the text" because "[i]n such cases, there is no 'Indian family' that includes the father to break up." Pet. Br. 30. But that manifestly is not so: A termination of parental rights that will prevent a father from raising his biological daughter, in the company of her grandparents and other members of her extended family, surely would effectuate a "breakup" of that family in the ordinary sense. To refer again to the dictionary, among the principal definitions of "breakup" is "[t]he discontinuance of a relationship." American Heritage Dictionary 235 (3d ed. 1992). And that doubtless describes an action that will terminate a father's legal relationship with his daughter.

Petitioners' further contention that it "would be both perverse and cruel to require prospective adoptive parents * * * to find and convince the father who abandoned that child to grasp the reins of parenthood" (Pet. Br. 31) is a non sequitur; although Section 1912(d) requires the party seeking to terminate the parental relationship to show that remedial efforts to prevent the breakup of the family "have been made," the "efforts" may be those of the Tribe, or of a State or private adoption agency. See U.S. Br. 22. And petitioners are poorly situated to insist that ICWA does not require adoptive parents to offer notice of their plans "so that tribes can cajole fathers to seek custodial rights." Pet. Br. 32. No "cajoling" by petitioners was required here: Father asserted his

interest in raising Baby Girl literally the moment he was belatedly informed of petitioners' adoption plans. Timely notification of Father is all that would have been necessary to prevent the breakup of this Indian family.

3. Finally, petitioners are wrong when they point to four other provisions of ICWA that, they assert, "show that neither fathers nor tribes can invoke ICWA to block an adoption without an existing Indian family." Pet. Br. 35. It is revealing that petitioners have never before suggested that *any* of these provisions bears on the question here. Most of the courts that have embraced the "existing Indian family" doctrine also have not relied upon, or even cited, any of these provisions. That is for good reason: These disparate statutory sections use differing language to address particular narrow circumstances. None has any application here.

Section 1913 provides that, when voluntary consent to termination of parental rights is withdrawn, the child "shall be restored to the parent." Petitioners read this to mean that ICWA applies only to custodial parents. Pet. Br. 37-38. But the plain intent of this provision is that, upon revocation of consent, the status quo ante (whatever that was) will be restored. Section 1913 does not use the word "custody" at all, and petitioners cannot seriously suggest that non-custodial parents have no right to revoke termination of their parental rights under the plain terms of Section 1913.

Petitioners describe **Section 1914** as providing that "any parent ... from whose *custody* such child was *removed* ... may petition any court of competent jurisdiction to invalidate" a termination of parental rights that violated specified provisions of ICWA.

Pet. Br. 35. Petitioners take this language to mean that only custodial parents may benefit from ICWA. In fact, however, the provision, fully quoted, actually states that "any parent *or Indian custodian from whose custody such child was removed, and the Indian child's tribe*" may petition to invalidate a termination of parental rights. 25 U.S.C. § 1914 (emphasis added). As the Tenth Circuit has noted, this language is best read to so "that 'any parent' stands alone, unmodified by the phrase 'from whose custody such child was removed.'" *Morrow* v. *Winslow*, 94 F.3d 1386, 1394 n.4 (10th Cir. 1996). Moreover, the *tribal* right to petition unquestionably is not limited by any custodial requirement, which shows conclusively that termination of parental rights may be set aside even when the parent was non-custodial. And in any event, for the reasons we have explained, the use of "custody" in this context is best understood to refer broadly to all parental rights.[18]

Section 1916 provides that, when a decree of adoption is set aside or the adoptive parents voluntarily consent to termination of their parental rights, a biological parent "may petition for return of custody." We think this is best understood as offering an opportunity to restore broad parental rights and gain legal custody. But however that may be, the provi-

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[18] This understanding is confirmed by the House Report, which describes Section 1914 as "authoriz[ing] the child, parent, or Indian custodian, or the tribe to move to set aside any foster care placement or termination of parental rights." H.R. Rep. No. 95-1386, at 23. Congress thus described the provision in terms that make no reference to "custody" except as implicit in the circumstances of an Indian custodian, and indicate expressly that all interested parties may act when parental rights are terminated in violation of ICWA.

sion addresses circumstances where parental rights *already* have been terminated, a situation far removed from the one in this case.[19] The same is true of **Section 1920**, which applies in the special circumstance where someone "has improperly removed the child from custody of the parent"; that Congress specifically addressed ICWA to that circumstance hardly means that the entirety of ICWA is directed *only* to that circumstance.[20] Petitioners, in short, have offered no reason to read into ICWA unstated and harmful limitations that would frustrate the congressional purpose.

III. THE ADOPTION ALSO IS PRECLUDED BY ICWA'S PREFERENTIAL PLACEMENT PROVISION.

For those reasons, the decision below should be affirmed. But there is an additional, independent ground on which petitioners cannot prevail, stated as an alternative holding by the court below and ad-

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[19] Petitioners also fail to acknowledge that, in a proceeding under Section 1916, the court must grant the parent's petition for return of custody "unless there is a showing, in a proceeding *subject to the provisions of section 1912 of this title*, that such return of custody is not in the best interests of the child." (Emphasis added). Because a child subject to a Section 1916 proceeding by definition is not in the natural parent's custody, this provision shows that Congress expected Section 1912(f) to apply even when the child is not in the custody of the biological parent at the time of the proceeding.

[20] Moreover, Section 1920 plainly had in mind the special situation of *physical* custody, addressing the problem of state social workers and others who physically removed Indian children from their homes without the parents' permission. See H.R. Rep. No. 95-1386, at 25.

dressed at length by Cherokee Nation: Adoption of Baby Girl by petitioners is precluded by the placement preference provision established in Section 1915.

Section 1915(a) provides: "In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." This preference is not optional; as the Court has explained, it is "[t]he most important substantive requirement imposed on state courts" by ICWA. *Holyfield*, 490 U.S. at 36. By its plain terms, it applies in all adoptive placements of Indian children.

Here, as the South Carolina Supreme Court held, there is no "good cause" to disregard the placement preferences. Below, petitioners offered only one ground for avoiding the preferences: that a bond had formed between Baby Girl and petitioners *after* she was placed in their home. But as the state court correctly explained, "rather than seek to place Baby Girl within a statutorily preferred home, [Birth] Mother sought placement in a non-Indian home. In our view, the ensuing bond that has formed in the wake of this wrongful placement cannot be relied on * * * to deviate from the ICWA's placement preferences." Pet. App. 38a-39a. Petitioners did not question that holding in their petition for certiorari and do not renew their argument regarding "bonding" or good cause here.

Instead, petitioners contend that Section 1915 applies only when there is a "preexisting Indian family." Pet. Br. 52. But as is apparent from their discussion (see *id.* at 52-54), this argument is utterly

without textual support in Section 1915(a), which provides that the preferences must be applied to "any adoptive placement of an Indian child." Indeed, the House Report explained that Section 1915 "as a whole[] contemplates those instances where the parental rights of the Indian parent *already has been terminated*," in which circumstance the placement preferences "would strengthen the chances of the Indian child staying within the Indian community and growing up with a consistent set of cultural values." H. Rep. No. 95-1386, at 24, 31 (emphasis added). The provision thus expressly contemplates situations in which the child is *not* part of an Indian family at the time of the adoptive placement. Accordingly, although petitioners assert that Section 1915(a) "does not authorize courts to create new Indian families" (Pet. Br. 52), that is just what its plain text *does*: if the child cannot be placed with a member of his or her extended family, the court is directed to look to "other members of the Indian child's tribe" or to "other Indian families."

Petitioners' other argument is that Section 1915(a) comes into play only when a "preferred party specified in the provision is before the family court." Pet. Br. 55. This argument, too, finds no support in the statutory language. And it is nonsensical in a case such as this one, where the child's natural father sought custody and there would have been no reason for other members of Baby Girl's extended family or of her Tribe to step forward unless Father were found unsuitable. The record here makes clear, moreover, that, had it been necessary, there would have been no difficulty finding a preferred placement: Baby Girl's grandmother appeared in court and testified that she and Baby Girl's grandfather would have taken placement of Baby Girl "in a mi-

nute." JA 151. Petitioners' arguments, not advanced below and in any event insupportable, cannot save their case.

IV. ICWA IS IN ALL RESPECTS CONSTITUTIONAL.

Finally, petitioners and the GAL contend that, unless their reading of ICWA prevails, application of the statute in the circumstances of this case will run afoul of no fewer than three separate constitutional principles. The Cherokee Nation and the United States thoroughly refute this improbable contention, and we do not repeat their arguments here. But several points bear special emphasis.

1. Petitioners and the GAL invoke equal protection principles. Pet. Br. 44-47; GAL Br. 53. They do not contend that ICWA generally is unconstitutional, conceding that the statute properly draws distinctions based on considerations of Indian sovereignty where applied "to protect preexisting connections between an Indian child and her custodial parent." Pet. Br. 45. See also GAL Br. 54-55. But when the parent does not have custody of the Indian child at the time of the child custody proceeding, they continue, the Tribe's sovereign interest "evaporates" and the statutory distinction becomes one that is based solely on race. Pet. Br. 45.

This distinction, however, is chimerical. ICWA draws political rather than racial distinctions because it responds to what Congress identified as a profound problem affecting Tribes *as sovereign entities*: "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" (25 U.S.C. § 1901(3)); yet the adoption of Indian children by non-Indians had "'se-

riously undercut the tribes' ability to continue as self-governing communities'" (*Holyfield*, 490 U.S. at 34); ICWA therefore sought to advance "the rights of the Indian community and tribe in retaining its children in its society." H.R. Rep. No. 95-1386, at 23. ICWA furthers that goal in just the same way whether the parent is custodial or non-custodial at the time of the child custody proceeding: In either case, it assures that the Indian child prospectively has bonds with his or her Tribe. That is certainly true in this case, where the Family Court found that Father "has a strong cultural tie to the Cherokee" and that his family home reflected "pride and connection to the [Cherokee] Nation and the Wolf Clan." Pet. App. 118a-119a. Placement with Father thus affords Baby Girl the opportunity to grow up immersed in Cherokee traditions and strengthens the Tribe as a sovereign political entity.[21] Petitioners' recognition that ICWA is constitutional as applied to custodial parents thus dooms their constitutional claim.

Against this background, petitioners and the GAL are wrong in contending that ICWA's classifications are based on race. As the United States shows (U.S. Br. 28-29), it is membership or eligibility for membership in a Tribe, the quintessential political consideration, that triggers application of ICWA.

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[21] Petitioners invoke the views expressed by the Justice Department prior to ICWA's enactment regarding the statute's jurisdictional provisions. Pet. Br. 46-47. Congress carefully considered and rejected those views. H.R. Rep. No. 95-1386, at 36-37. The Department itself acknowledged that it did not review the legislative history or testimony when it noted its concerns, which "necessarily would be considered by a court which had to interpret [ICWA's] provisions and determine its constitutional validity." *Id.* at 35.

And that application of ICWA to a child who is eligible for tribal membership is coupled with the child's having a biological parent who *is* a member no more makes for a racial classification than does the rule that automatically makes a child born "of parents" who are U.S. citizens, or born "to a member" of an Indian tribe, a citizen of the United States. 8 U.S.C. § 1401(c), (b).[22]

2. Petitioners are wrong to contend that application of ICWA in cases not involving a "preexisting Indian family" would "upset the federal-state balance." Pet. Br. 50-51. This Court has long recognized Congress' "plenary and exclusive" power with respect to Indian tribes. *United States* v. *Lara*, 541 U.S. 193, 200 (2004). See also *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 531 (1998). That authority is not limited to reservations or tribal lands, but applies "whether upon or off an Indian reservation." *United States* v. *Nice*, 241 U.S. 591, 597 (1916). Here, Congress explained in considerable detail, in the text of the legislation, why the exercise of this authority

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[22] The GAL and petitioners repeatedly note that Baby Girl has "a 3/256 quantum of Cherokee blood." GAL Br. 3; *id.* at 18 & n.6, 30, 52; Pet. Br. 6 n.1. It is not entirely clear what conclusion they draw from that observation. It is undisputed that Baby Girl is eligible for membership in the Cherokee Nation and that she is an "Indian child" within the meaning of ICWA. Petitioners and the GAL do not challenge the fundamental rule that Tribes have a sovereign right to set their own criteria for tribal citizenship. See *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 72 n.32 (1978). And they surely do not contend that ICWA would be more constitutionally defensible if it required that an "Indian child" have a higher blood quantum than does Baby Girl. If anything, their observation accordingly emphasizes the political rather than the racial nature of the distinction at issue here.

in ICWA was essential to the survival of Indian Tribes. To the extent that ICWA overrides state law, it does so for good reason: "Congress perceived the States and their courts as partly responsible for the problem [the ICWA] intended to correct." *Holyfield*, 490 U.S. at 44–45. Accordingly, state courts have themselves recognized that federalism concerns do not support the "existing Indian family doctrine." See *In re Guardianship of D. L. L.*, 291 N.W.2d 278, 281 (S.D. 1980); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 326 n.7 (App. Div. 2005).

3. There is no substance to the assertion of petitioners and the GAL that application of ICWA would infringe the substantive due process rights of Birth Mother or of Baby Girl herself. While a natural parent does indeed have a constitutionally protected interest in *raising* his or her child (see, *e.g.*, *Troxel* v. *Granville*, 530 U.S. 57, 70 (2000)), Birth Mother has here finally and definitively relinquished her interest in Baby Girl. No provision of the Constitution suggests that the wishes of such a parent unilaterally to place the child with a particular caregiver overrides both the views of the other natural parent—who *does* want to raise the child himself—and a state determination of the child's best interests.

As for Baby Girl, this Court never has held that the Constitution incorporates a "best interests of the child" rule. See *Reno* v. *Flores*, 507 U.S. 292, 303-304 (1993). But even if it did, the fact of the matter is that ICWA incorporates just such a standard, reflecting a congressional judgment, based on substantial evidence, about the considerations that advance an Indian child's best interest. See 25 U.S.C. § 1902; *Holyfield*, 490 U.S. at 49-50 n.24. Both courts below therefore explained that the best interest inquiry "is

not *replaced* by ICWA's mandate" (Pet. App. 34a); "[w]hen parental rights and the best interests of the child are in conflict, the best interests of the child must prevail" (*id.* at 128a). In this case, after extensive examination of the record, both courts found "no conflict between the two" because Father is "a fit and proper person to have custody of his child" who "has convinced [the court] of his unwavering love for this child." *Ibid.* See also *id.* at 36a-37a ("[W]e cannot say that Baby Girl's best interests are not served by the grant of custody to Father, as [petitioners] have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family."). The GAL accordingly is quite wrong in asserting that the only inquiry conducted below "was whether Birth Father was likely to 'seriously' harm Baby Girl if he obtained custody of her." GAL Br. 52.

The GAL also argues that ICWA here deprives Baby Girl of her interest in remaining with petitioners, with whom the GAL claims she forged the only "intimate human relationships" she had ever known. GAL Br. 57. We do not question petitioners' emotional commitment to Baby Girl, in what has been painful and difficult litigation for all the parties. But "the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'" *Holyfield*, 490 U.S. at 54. And insofar as the connection described by the GAL is thought relevant, petitioners' is no longer "the only home [Baby Girl] has ever known." GAL Br. 58. By the time of this Court's decision, Father will have cared for Baby Girl for almost 18 months in a loving and stable environment, surrounded by her extended family, during a critical period in her development. Because the decision below properly applied ICWA

and took full account of Baby Girl's best interests, this Court should not break such a connection between a devoted father and his daughter.

CONCLUSION

The judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted.

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IN THE

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ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

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QUESTION PRESENTED

The South Carolina courts held that Father was a "parent" under the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-1963, his parental rights should not be terminated under §1912, and he was a fit and proper parent who should have custody of his daughter, Baby Girl, an "Indian child" covered under the Act. The South Carolina Supreme Court also recognized that Adoptive Couple was not entitled to custody by virtue of §1915(a). The Father's brief primarily addresses his rights under the Act. The Cherokee Nation primarily focuses on the following question:

> Whether the determination that Adoptive Couple is not entitled to custody of this Indian child under §1915(a) provides a separate ground to affirm the judgment of the South Carolina Supreme Court, and whether the constitutional avoidance doctrine permits unambiguous terms in the Act to be construed contrary to their plain meaning, when the Act falls comfortably within Congress's broad authority under the Constitution to protect Indian Tribes and does not violate any due process or equal protection rights of Adoptive Couple, Mother, or Baby Girl.

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INTRODUCTION

Baby Girl is an "Indian child" within the meaning of the Indian Child Welfare Act. She lives with her Father, a citizen of the Cherokee Nation, and her extended family, in Nowata, Oklahoma, an Indian community within the Cherokee Nation. This situation is consistent with Congress's considered judgment in the Indian Child Welfare Act that the interests of an Indian child are best served when the child is raised within an Indian family and community.

Baby Girl has been living with her Father because the South Carolina courts correctly determined, based on the evidence, that her Father is a parent whose custodial rights should not be terminated and that the adoption petition should be denied. The courts made an individualized determination, based upon the evidence, that the Father was able to "create[] a safe, loving, and appropriate home for her." Pet.App. 32a. Consistent with those findings, Baby Girl has been living with her Father and among her tribal community since New Year's Day 2012.

This result—sanctioned by the Indian Child Welfare Act and the South Carolina courts, and advancing the interests of Baby Girl, her Father and the Cherokee Nation—should not now be unsettled. This Court should affirm the decision that allowed Baby Girl to return to her Father and extended family within the Cherokee Nation.

STATEMENT

A. The Indian Child Welfare Act

The Indian Child Welfare Act of 1978, ("ICWA") 25 U.S.C. §§1901-1963, was enacted to "protect the best

interests of Indian children and to promote the stability and security of Indian tribes and families." §1902. Congress found those interests directly threatened by past federal policies and state and private child custody actions which had separated Indian children from their families and Tribes. As this Court recognized in *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32 (1989), ICWA is:

> the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.

The child welfare problems Congress sought to correct were staggering, as documented by "numerous examples, statistical data, and expert testimony" presented at congressional hearings in 1974, 1977 and 1978. *Id.* at 32-33. As this Court noted:

> Studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that *25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. Adoptive placements counted significantly in this total*: in the State of Minnesota, for example, one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption. *The adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes.* A number of witnesses also testified to the serious

> adjustment problems encountered by such children during adolescence, as well as the impact of the adoptions on Indian parents and the tribes themselves.

Id. at 32-33 (footnote and citations omitted). The record before Congress further demonstrated that the Indian child welfare crisis extended well beyond involuntary proceedings, and that "Congress intended the ICWA to reach voluntary as well as involuntary removal of Indian children." *Id.* at 50 n.25.

Congress found these placements of Indian children in non-Indian families adversely affected not only Indian children but the Tribes as well, concluding "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." §1901(3). This Court specifically recognized Congress's concern for the Tribes, *Holyfield*, 490 U.S. at 32, adding that the Act must "be seen as *a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.*" *Id.* at 49 (emphasis added).

In response to this well-documented crisis, Congress enacted ICWA. ICWA seeks to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," §1902, through a comprehensive and balanced framework. ICWA defines "Indian child" to include any child who has a political relationship with a Tribe by being either (1) a member of a federally recognized Tribe or (2) eligible for membership in a federally recognized Tribe and the biological child of a member of such Tribe. §1903(4), (8). Where an "Indian child" is involved, ICWA applies to *all* state court "child custody proceedings," including any foster care placement, termination of parental rights, preadop-

tive placement, or adoptive placement proceeding involving an "Indian child." §1903(1).[1]

ICWA establishes critical procedural safeguards and minimum federal standards applicable to all such proceedings. *Holyfield*, 490 U.S. at 56. ICWA requires voluntary consents to adoption to be executed before a judge, allows revocation of a consent to adoption "any time prior to the ... final decree of ... adoption," and requires proof "beyond a reasonable doubt" before any involuntary termination of parental rights. §§1913(a), (c), 1912(f). ICWA's provisions regarding voluntary and involuntary termination of parental rights apply to both parents of an Indian child—whether the parent is Indian or non-Indian.[2]

ICWA's "most important substantive requirement imposed on state courts" seeks to preserve families and the ties between the child and her Tribe by establishing presumptive preferences for the placement of Indian children. *Holyfield*, 490 U.S. at 36-37 (discussing §1915(a)). These preferences apply "in the absence of good cause to the contrary," a provision

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[1] ICWA preserves exclusive tribal jurisdiction over an Indian child who is domiciled on an Indian reservation or a ward of a tribal court, §1911(a); *Holyfield*, 490 U.S. at 36; *see also Fisher* v. *Dist. Court*, 424 U.S. 382, 390-91 (1976) (per curiam), while providing concurrent state-tribal jurisdiction over all other child custody proceedings. §1911(b). As to state court proceedings, a Tribe may either seek a transfer of the proceeding to tribal court, §1911(b), or intervene in the state court case, §1911(c). A request for transfer to tribal court will be denied if either parent objects or if the state court finds "good cause" to decline the transfer. §1911(b).

[2] ICWA further provides that in any case where federal or state law establishes "a higher standard of protection to the rights of the parent," the higher standard applies. §1921.

which recognizes the need for flexibility in compelling circumstances.

ICWA further protects the Indian child's interest in a relationship with her Tribe, and in the political and cultural rights and benefits that flow from tribal membership. The Act does this by requiring that final adoption decrees involving Indian children be provided to the Secretary of Interior, so that such information may be provided to the child upon request at adulthood, §1951; *see also* §1917.

B. Facts

The events that led to the South Carolina courts' placement of Baby Girl with her Father are recounted in Father's brief and the Cherokee Nation incorporates that statement here.

The Cherokee Nation adds that it is a federally recognized Tribe and party to numerous Treaties and agreements with the United States. *E.g.*, Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. 799. The Cherokee Nation governs pursuant to a Constitution and provides essential health,[3] education,[4] public safety, and human resource services to Cherokee Nation citizens and their families. The Cherokee Nation provides these services throughout a 14-county area within northeastern Oklahoma—the Nation's 1866 Treaty area. Baby Girl, her Father and her extended family live within this area, just

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3 http://www.cherokee.org/Services/Health/30865/Information.aspx

4 The Nation's education services begin with Head Start and continue through college and adult education. Cherokee children are eligible for free enrollment in the Cherokee Immersion School, which teaches the entire curriculum in the Cherokee language. *See* http://www.cherokee.org/Services/Education/Default.aspx.

east of where she was born and where Mother lives. Baby Girl's home is eight blocks from the Nation's Will Rogers Health Center. Her grandparents live down the road, her half-sister lives nearby, and the Cherokee Nation's social services department regularly visits Baby Girl to monitor her care and well-being.

The Cherokee Nation's Human Services Department provides comprehensive programs to promote personal and family unity as well as economic and social stability.[5] This Department contains the Children Youth and Family Services agency ("CYFS"). CYFS is responsible for monitoring, intervening, and providing social services in a range of matters involving Cherokee children and families, including social services in state and tribal child custody proceedings. As part of its work, CYFS certifies foster and adoptive homes and has approximately 100 available "Resource" homes. Residents of Cherokee Resource homes undergo extensive training that includes child safety and well-being, and legal and cultural issues. Record on Appeal (ROA) 446-49. The breadth and depth of the Nation's comprehensive CYFS agency reflects the Nation's strong governmental interest in protecting Cherokee children.

The Cherokee Nation also offers a wide range of services to expectant mothers (Indian and non-Indian) whose children will be eligible for enrollment as Cherokee citizens. The Nation assists mothers in eliminating socio-economic barriers that are often the driving force behind adoption. If a mother chooses to place her child for adoption, the Nation assists in locating appropriate family members (unless the mother requests anonymity), and provides the

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[5] http://www.cherokee.org/Services/Human/Default.aspx

mother with a wide variety of pre-approved adoptive "Resource" homes for consideration. The Nation has families available to meet the mother's wishes and needs based on desired openness of adoption, locale, cultural and religious background, and other factors. If the mother is working with an adoption agency, the Nation assists the agency in locating appropriate relative placements or providing the agency with pre-approved Cherokee homes for the mother's consideration.

Membership in the Cherokee Nation (defined as "citizenship" under the Cherokee Constitution, much like citizenship in the United States Constitution), carries with it important rights and interests. Nation citizens are eligible to vote in Nation elections, run for tribal government office, participate in the wide range of governmental services, programs and benefits the Nation makes available to its citizens, and share in the use of tribal assets and resources. Nation citizenship also carries with it intangible interests in Cherokee culture and tradition, and the opportunity to participate in and shape the Cherokee polity.

C. Proceedings Below

The proceedings in this case are described in the Father's brief, which the Nation incorporates by reference. The Nation intervened in the proceedings before the South Carolina courts pursuant to ICWA, §1911(c). The Nation presented evidence bearing on the Father's status as an enrolled Cherokee citizen, his suitability as a parent, and the customs and culture of the Cherokee people as they relate to the Father and his family and their role in Baby Girl's life. While the Nation supported (and continues to support) the Father's parental rights and custody of his daughter, the Nation also provided the South

Carolina court with evidence regarding qualified alternative placements for the child with extended family members, and was prepared to offer alternative preferred placements with other Cherokee Nation families consistent with ICWA. *See* JA 77-96, 151; ROA 446.

SUMMARY OF ARGUMENT

I. The Indian Child Welfare Act was enacted by Congress to address a nationwide crisis. Tribes across the country were losing children in staggering numbers based on culturally insensitive, and often abusive, state and private child welfare practices. Recognizing that the very future of tribal self-government demanded a resolution of this problem, Congress enacted a comprehensive set of jurisdictional, procedural and substantive provisions to address voluntary and involuntary child custody proceedings involving Indian children.

There is no dispute that this case involves an "Indian child" and a "child custody proceeding" under the Act. The South Carolina courts, properly recognizing that these are the only statutory prerequisites, applied ICWA. Based on the evidentiary record, the courts determined that Father's parental rights should not be terminated and awarded custody of Baby Girl to Father, a member of the Cherokee Nation. Baby Girl and her Father have lived together in a Cherokee community in Oklahoma for over a year, a result fully consistent with Congress's intent in enacting ICWA. This is where Baby Girl should remain.

Even if this Court were to hold that the state court erred in its rulings regarding the rights of Father, the proper disposition would still be to affirm the denial of the adoption petition pursuant to §1915(a). Section

1915(a), "[t]he most important substantive requirement imposed on state courts," *Holyfield,* 490 U.S. at 36, provides a series of presumptive placement preferences—including extended family members, and other tribal members—in connection with the adoption of Indian children. These preferences apply in the absence of "good cause" to the contrary. The South Carolina Supreme Court properly applied §1915(a), and on that independent basis denied the Petitioners' application to adopt the child. Pet.App. 37a-39a. Based on the factual record before it, the court held that Petitioners failed to demonstrate "good cause" to depart from §1915(a)'s presumptive placement preferences. Since Petitioners do not here challenge that court's ruling on §1915(a), this provides a separate and independent ground for affirmance.

II. Petitioners' efforts to severely limit the scope of ICWA by the use of the "existing Indian family" doctrine reflects a palpable schizophrenia. On the one hand, Petitioners recognize that the "existing Indian family" doctrine has been sharply criticized for many reasons, including because it commands state courts to make a subjective and standardless evaluation of whether a family is "'Indian enough' to merit protection under ICWA." Pet. Br. 40. On the other hand, they cannot resist trying to limit the sweep of the Act to only one aspect of the broad child welfare problems Congress addressed in ICWA—removal of an Indian child from his or her family because of cultural misunderstandings.

Petitioners' insistence upon a "preexisting Indian family" must fail because Congress did not so limit ICWA. No such requirement can be found in the statutory text, and the legislative history shows beyond any doubt that Congress intended to cover

many situations—including adoptions at birth—where no "preexisting Indian family" could possibly be present. This Court in *Holyfield* made plain that Congress enacted ICWA in significant measure to protect Tribes' interests in their children, and that ICWA therefore applies (as it was applied in *Holyfield* itself) where children have never lived a day with an Indian parent or family. *Holyfield*, the statutory text, and the legislative history are fatal to Petitioners' "preexisting Indian family" argument and their related argument that ICWA does not apply absent a custodial Indian parent.

III. Petitioners and the Guardian ad Litem ("GAL") make no direct constitutional attack on ICWA. They abandoned their constitutional arguments below and press no such issues in their questions presented. Their argument that adopting an atextual "preexisting Indian family" doctrine is necessary to avoid a constitutional infirmity fails because the constitutional avoidance doctrine has no application when the statute speaks clearly to the issue at hand. Here, ICWA's operative terms "child custody proceeding" and "Indian child" are clear and unambiguous. Any constitutional arguments are for another day when the issue has been squarely presented.

If this Court nevertheless reaches constitutional issues, the Petitioners' and GAL's contentions do not withstand scrutiny. This Court has repeatedly affirmed that the Constitution affords Congress broad authority in Indian affairs. *United States* v. *Lara*, 541 U.S. 193, 200-04 (2004). Yet Petitioners and GAL urge a formulation that would strip Congress of its powers, and would make federal authority in Indian affairs dependent on a subjective state court determination regarding the extent of the connection between an individual and his Tribe. Pet. Br. 44;

GAL Br. 54. There is no basis for restricting Congress's constitutional power over Indian affairs to accommodate such a wholly subjective and standardless test.

This Court has repeatedly emphasized that legislation regarding Indian affairs properly addresses Tribes as political entities, and that legislation aimed at tribal interests and tribal members therefore does not constitute an impermissible racial classification. *Morton* v. *Mancari*, 417 U.S. 535, 552 (1974); *United States* v. *Antelope*, 430 U.S. 641, 645-47 (1977). ICWA expressly deals with Indians in terms of their political affiliation with their Tribe, and makes no mention of a child's Indian ancestry or blood quantum.

Consistent with *Mancari*, 471 U.S. at 555, ICWA is rationally tied to the fulfillment of the government's unique obligation to Indians. Congress enacted ICWA based on a comprehensive record demonstrating that the future of Tribes as self-governing entities was jeopardized by abusive child welfare practices that led to the massive loss of tribal children. Under its broad constitutional authority over Indian affairs, Congress in ICWA addressed this problem through carefully tailored and specific terms focused on tribal membership. In addressing the core interest of Tribes with respect to their members—and the interest of members in the political, property and other rights associated with tribal membership—Congress acted well within its authority in fulfilling its unique obligations to Tribes. There is no equal protection violation here.

Petitioners' and GAL's other constitutional arguments fare no better. The application of ICWA cannot violate the Mother's liberty interests in raising her child because Mother has sought only to

relinquish her rights to raise the child, and accordingly has *no* liberty interest after doing so. And while this Court has not defined the scope of a child's liberty interest in the family context, it is clear that, however defined, a child's first interest is in her relationship with her Father. As for Petitioners, temporary custody is a matter of statutory, not constitutional, right. Nor is there a federalism concern presented here, as best exemplified by the fact that neither South Carolina, nor any other State, has suggested otherwise. In any event, ICWA involves a congressional determination that federal law must protect the core tribal interest in assuring that Indian children may become members who will maintain the future of Tribes as self-governing entities. Given Congress's plenary authority in this area, ICWA's application here raises no federalism issues.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT PROPERLY APPLIED ICWA.

A. The South Carolina Supreme Court's Determination That Father Is A "Parent," That His Parental Rights Should Not Be Terminated, And That He Should Have Custody Of Baby Girl Should Be Affirmed.

The South Carolina Supreme Court—both the majority *and* the dissent—correctly determined that this case involves an "Indian child" and a "child custody proceeding," and that, since these are the *only* statutory prerequisites, ICWA accordingly applies. Pet.App. 13a (majority); Pet.App. 59a (dis-

sent).[6] Both the majority and dissent also agreed that Father met ICWA's definition of "parent" by "both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establishing his paternity through DNA testing." Pet.App. 22a (majority); *accord* Pet.App. 58a (dissent). After reviewing competing expert testimony, the Supreme Court stated that "we can only conclude from the evidence presented at trial that Father desires to be a parent to Baby Girl, and that he and his family have created a safe, loving, and appropriate home for her." Pet.App. 32a; *see also* Pet.App. 127a (Family Court) ("There is no evidence to suggest that [Father] would be anything other than an excellent parent to this child."). In sum, in awarding custody to Father, the South Carolina courts fully protected the best interests of this Indian child, in accordance with ICWA's fundamental purpose. That ruling should be affirmed.

While the Solicitor General agrees that the South Carolina Supreme Court's decision should be affirmed, he disagrees with that court's understanding of §1912(f). US Br. 23-26. That provision governs proceedings regarding the "termination of parental rights," defined as "any action resulting in the termination of the parent-child relationship." §1903(1)(ii). That definition clearly addresses a legal relationship, independent of any custody requirement. The Solicitor General agrees that a parent's legal or physical custody triggers §1912(f), but suggests that no specific finding was made by the South Carolina Supreme Court with respect to Father's

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[6] The source and scope of Father's rights under ICWA are addressed fully in the Father's brief and the Cherokee Nation incorporates the Father's arguments in full.

custody. US Br. 25. But here, Father was held to be a "parent," and accordingly, for purposes of ICWA he had "parental rights" (and presumptive legal custody) which could not be "terminated" absent compliance with §1912(f). Since Father is a "parent," no further finding of custody was required. Indeed, requiring an additional finding of custody outside of ICWA would remove many parents from the Act's purview—including parents stationed overseas in the military, parents with children in foster care, and divorced parents who only have visitation rights. There is no indication that Congress intended to limit the rights of such parents. The better understanding is that Congress intended ICWA's protections regarding "parental rights" to apply to all who fall within the definition of "parent," and the South Carolina Supreme Court should be affirmed on this basis as well.

This case illustrates well ICWA's abiding importance. To be sure, this case involves sharply disputed views of the facts—as reflected in the widely different recitations set forth by the Family Court and the majority, on the one hand, and by the dissent on the other. These facts were resolved through full proceedings in the South Carolina courts. The result (thus far) is that an Indian child is living in Oklahoma with her Indian father surrounded by her extended family within the Cherokee Nation—and without question the child is thriving. Having now lived with her Father and Grandparents for over a year, and having successfully transitioned from her former custodial situation, the child should not now be made to leave her Father's home and the Indian environment that supports and nurtures her.

B. The South Carolina Supreme Court's Denial Of The Adoption Petition Under 25 U.S.C. §1915(a) Should Be Affirmed.

The decision below correctly applied ICWA, holding that Father was a "parent," retained his parental rights, and should have custody of Baby Girl, Pet.App. 40a, and it should be affirmed on these grounds. Not only is the father the correct person to have custody, but also, even if he were not, the adoptive couple are clearly not an appropriate placement for Baby Girl in light of §1915(a).

The South Carolina Supreme Court denied Petitioners' adoption petition. It did so because the Petitioners failed to meet ICWA's presumptive placement preferences applicable in "*any adoptive placement* of an Indian child under State law." §1915(a) (emphasis added). The court determined that the Petitioners failed to show "good cause" to deviate from these placement preferences. Pet.App. 37a-39a. This holding—which expressly "affirm[ed] the family court's denial of the adoption decree," Pet.App. 40a—was not challenged below in the petition for rehearing before the South Carolina Supreme Court, nor was this issue included in the Petitioners' questions presented here.

This provides a separate and independent ground for affirmance. That is, in the event this Court disagrees with the South Carolina courts' conclusion that the Father retained parental rights to his daughter, the proper result still would be to affirm, based on the South Carolina Supreme Court's denial of the adoption petition under §1915(a). Since the Petitioners' adoption petition has been rejected, and since that determination is not the subject of any question presented here, Petitioners lack any further interest in this proceeding. Moreover, since Baby

Girl has resided in Oklahoma for over a year with Father, and since Petitioners (the only link with South Carolina) no longer have any claim to custody, the South Carolina courts lack jurisdiction over any future proceedings that may involve her. *See* 28 U.S.C. §1738A(d). There is simply nothing left for the South Carolina courts to do.[7]

In addition to providing an appropriate ground for disposition here, §1915 illustrates certain key features of ICWA.

First, §1915(a) reflects Congress's decision to promote and protect the Tribe's interest in its children, and the child's corresponding interest in affiliation with her Tribe. As this Court in *Holyfield* stated in discussing this very section:

> The ICWA thus, in the words of the House Report accompanying it, "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."

490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23, 24 (1978)). Based in significant measure on the devastating impact on *Tribes* of abusive state and private custody actions involving Indian children,

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[7] Even if this Court does not affirm (and concludes that the South Carolina courts somehow retain jurisdiction), a remand for application of §1915 would be the appropriate disposition.

Congress established a presumption that Indian children be placed with extended family or tribal members. §1915(a)(1), (2). Congress also authorized a Tribe to adopt its own order of preference regarding placement, required that tribal community standards be used in placement determinations, and provided Tribes with a right to request and obtain state records of state court Indian child placements. §1915(c), (d), (e). By these means, §1915 embodies ICWA's core thrust—that "Congress was concerned not solely about the interests of Indian children and families, but also about *the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians*." *Holyfield*, 490 U.S. at 49 (emphasis added).

Second, §1915(a) demonstrates that Congress undertook a careful balancing of the interests involved, authorizing a range of possible placements. While the Act generally favors placements with tribal members, the first option listed—"a member of a child's *extended family*"—includes the possible placement of an Indian child with his or her *non-Indian* extended family. Moreover, in the case of the Cherokee Nation, the placement options for a Cherokee child also include approximately 100 available and certified adoptive Cherokee homes.[8] ROA 446.

What is more, §1915(a) does not mandate any particular placement outcome. Like ICWA's other provisions, §1915(a) is part of a statutory framework that provides state courts *options* to address the

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[8] Tribes have a history of using a variety of alternative placements for Indian children by which a child is provided a stable, secure and loving home. *See* Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 Cap. U. L. Rev. 239, 278-90 (2008).

compelling circumstances that sometimes arise in custody cases. What makes ICWA unique is it seeks to eliminate the inherent bias that non-Indian decision-makers often have in preferring a non-Indian custodial arrangement. By giving every Tribe an independent statutorily-recognized interest in protecting its existence by retaining Indian children within its sphere of influence, the statute makes certain that the interests of the child are not skewed by cultural biases.

Section 1915 operates in tandem with ICWA's other jurisdictional rules, procedural safeguards and substantive standards, all in aid of a basic presumption that an Indian child's best interests (as well as the Tribe's best interests) are generally served when the child is raised with her family and within the Tribe. §§1911-1915. At the same time, Congress included protecttions to assure that, in appropriate cases, that presumption may be overcome and the determination of the appropriate decisionmaker—and ultimately the appropriate placement decision itself—could properly accommodate a broader range of interests. Section 1915(a) operates in that context, establishing adoption placement preferences which apply "in the absence of good cause to the contrary." This "good cause" provision assures that ICWA is *not* an inflexible mandate that dictates results in every possible case. Indeed, following this Court's decision in *Holyfield*, the matter was sent back to the Tribe to exercise its own jurisdiction over the matter, and the Tribe awarded custody of the Indian twins to the non-Indian adoptive couple. *See* Atwood, *supra* note 8, at 279. Section 1915(a)'s "good cause" language authorizes state courts to make similar placement determinations in appropriate cases. *See* Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare*

Act: Toward a New Understanding of State Court Resistance, 51 Emory L.J. 587, 661-62 (2002).

To be sure, the "good cause" language must be applied in a manner that gives effect to Congress's basic intent that Indian children are best raised within their extended families or with other tribal families. It is therefore not a license for state courts to return to the abusive custody practices and prejudices that gave rise to ICWA. But properly applied, the "good cause" provision signifies that ICWA both creates a strong presumption that will control in the vast majority of cases, and provides an effective safety valve for those cases that present a sufficiently compelling justification to overcome that presumption. The "good cause" provision thus ensures that the ultimate custody decision reflects the child's best interests.

Petitioners seek to avoid the clear force of §1915(a) in various ways. Petitioners argue that §1915(a) is irrelevant to this case (Cert. Pet. 15 n.2), but then fault the South Carolina Supreme Court for failing to find good cause to deviate from the statutory preferences based on the time Baby Girl spent with Petitioners. Pet. Br. 53. But the South Carolina Supreme Court reviewed the factual record and concluded that "[Father] and his family have created a safe, loving and appropriate home," for his daughter (Pet.App. 32a), who was only two years old, and that Baby Girl at this age would likely transition well (as, in fact, occurred). The record further demonstrated that, from the time Baby Girl was four months old, Petitioners knew that Father sought custody, so that for the majority of the time Baby Girl was with Petitioners, they knew her ultimate placement was in doubt. Pet.App. 27a. The court determined that "under these facts," bonding between Petitioners and

Baby Girl during the pendency of a contested proceeding was insufficient to establish "good cause" under §1915(a). Pet.App. 38a-39a. This reasonable determination, based on the particular factual circumstances presented below, fully comports with ICWA. *Holyfield*, 490 U.S. at 37; *see also* 44 Fed. Reg. 67,584, 67,954-55 (Nov. 26, 1979).

Petitioners next argue that §1915(a) "requires a preexisting Indian family." Pet. Br. 52. But that is contrary to §1915(a)'s express language, which applies to "*any* adoptive placement of an Indian child" (emphasis added), and says nothing about preexisting Indian families. *See infra* at 22-27. There is no reason to import judge-made limitations where Congress chose words without limitation. Nor would it be "passing strange," Pet. Br. 52, or even uncommon, for Congress not to include any limitation within "[t]he *most important* substantive" provision of ICWA. *Holyfield*, 490 U.S. at 36-37 (emphasis added).

Petitioners also argue that "Section 1915(a) does not authorize courts to create new Indian families." Pet. Br. 52. But that is precisely what §1915(a) *does* command, establishing a presumptive placement preference for tribal members to adopt Indian children. Contrary to Petitioners' assertion, §1915(a) is unquestionably designed to facilitate the creation of new Indian (adoptive) families.

Petitioners also contend that the South Carolina Supreme Court's decision "is a *de facto* ban on the interracial adoption of any child suspected of having Indian ancestry." Pet. Br. 54. This is simply not so, as the result in *Holyfield* demonstrates. *Supra* at 18. Properly understood, ICWA provides only a presumption—albeit a strong presumption—in favor of placing an Indian child with members of her extended family or within her Tribe. It decidedly

does not *dictate* a result in any particular case, nor undermine a state court's responsibility to determine a child's best interests—precisely what the courts below did. Pet.App. 128a (Family Court) ("When parental rights and the best interests of the child are in conflict, the best interests of the child must prevail. However, in this case, I find no conflict between the two."); Pet.App. 36a-37a (agreeing with the Family Court and adding "we cannot say that Baby Girl's best interests are not served by the grant of custody to Father"). The South Carolina Supreme Court explained that a placement *could* be made outside of §1915's placement preferences if Petitioners proved "good cause" to deviate from those preferences, but found that Petitioners failed to make this showing and could not, in these circumstances, rely on a bond formed during the litigation itself. *See* Pet.App. 37a-39a.

Finally, Petitioners contend that §1915(a) should not apply because no alternative placement was presented to the Family Court. Pet. Br. 55. But in these proceedings it was premature for that court to consider alternative placements, since the threshold issues were whether Father had parental rights and, if so, whether his rights should be terminated. Only if those issues had been resolved against the Father would it have been appropriate for the court to receive full evidence on alternative placements. Nevertheless the South Carolina Supreme Court still made an independent finding that Petitioners had not shown good cause for Baby Girl to be placed with them, a finding made at the urging of Petitioners' counsel at oral argument.[9] In any event, the Nation

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[9] At oral argument, Petitioners' counsel urged the South Carolina Supreme Court to make an independent determination under §1915(a), even though the Family Court had not done so,

presented evidence at trial about potential alternative placements—that the paternal grandparents had been certified by the Nation as a qualified adoptive placement, that (as she testified) the paternal grandmother would have received Baby Girl "[i]n a minute," JA 77-96, 151, and that at that time the Nation had approximately 100 certified adoptive homes, ROA 446. Petitioners' argument simply ignores the record below.

Thus, even if this Court determines that ICWA does not support the award of custody of Baby Girl to Father, that portion of the decision denying the adoption based on §1915 should be affirmed. And even if that were not so, the appropriate disposition would be a remand where the Nation would be entitled to assert that §1915(a)'s placement priorities, including the preference in favor of the child's extended family, should be applied.

II. CONGRESS DID NOT CONDITION ICWA'S APPLICATION ON A "PREEXISTING INDIAN FAMILY."

Petitioners insist that no aspect of ICWA applies unless there was a "preexisting Indian family." *E.g.*, Pet. Br. 30, 40-41, 51-54. At the same time, Petitioners try to distance themselves from the wholly atextual "existing Indian family" doctrine adopted by a few state courts, in the hopes of dodging the criticism which that doctrine has appropriately invited—including "the propriety of examining whether a preexisting Indian family is 'Indian' enough to merit protection under ICWA." *Id.* at 40. But Petitioners cannot have it both ways: they cannot seek to limit ICWA by the concept of a "preexisting Indian family,"

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because Petitioners had raised this issue in their motion to reconsider before the Family Court.

yet evade the fundamental criticisms which have led a strong majority of state courts to reject the doctrine altogether.[10]

The text of ICWA does not support Petitioners' "preexisting Indian family" argument. The Act nowhere uses the term "preexisting Indian family," "existing Indian family," or any other variation of that phrase. The absence of a textual basis for the existing Indian family doctrine has been widely cited as a reason to reject it. *E.g.*, *In re Baby Boy C.*, 805 N.Y.S.2d 313, 323 (N.Y. App. Div. 2005); *Michael J., Jr.* v. *Michael J., Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000); *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990); *A.J.S.*, 204 P.3d at 549.

Moreover, ICWA's text plainly demonstrates that it applies whether or not there is a preexisting Indian family. Indeed, one of the provisions at issue here, §1903(9)'s definition of parent, expressly includes an unwed father who acknowledges or establishes paternity as a "parent" entitled to rights under ICWA. While by no means uniformly the case, it is fair to assume that many unwed fathers who acknowledge paternity will not have custody of their children. Nevertheless, Congress included *all* such unwed fathers who acknowledge or establish paternity as parents, without regard to the status of the family or the current custody of the Indian child.

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[10] The "existing Indian family" doctrine describes an approach to ICWA invoked by a small number of state courts (mostly States lacking significant tribal member populations), in which ICWA is not applied to certain Indian child custody proceedings. *E.g.*, *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), overruled *In re A.J.S.*, 204 P.3d 543 (Kan. 2009). The doctrine has been expressly *rejected* by the courts of 14 States, including the South Carolina Supreme Court below, and has also been rejected by six States by statute. *See* Cert. Opp'n 16 n.7.

Likewise, ICWA plainly applies to voluntary adoptions and voluntary terminations of parental rights, including those occurring immediately upon a child's birth. *E.g.*, §1913(a), (c), (d). Such children never live in any birth family at all, much less an "existing Indian family." So, too, §1915(a)'s placement preferences apply to "*any* adoptive placement of an Indian child," and §1915(b) applies to "*any* foster care or preadoptive placement." "Any" is clear, and these provisions require neither a preexisting Indian family nor an Indian custodial parent.

ICWA's legislative history confirms this point. Congress's inquiry revealed major problems associated with at-birth adoptions and other circumstances where a child had never lived with an Indian parent. Before ICWA, mothers of Indian children were often pressured by social workers and other agencies to give up their babies for adoption, even before the babies were born. *E.g.*, H.R. Rep. No. 95-1386, at 11 (1978) ("1978 House Report"); *Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. 167 (1974) ("1974 Senate Hearings"). The record also contained a study of a Bureau of Indian Affairs funded demonstration project to recruit Indian families to adopt Indian children. In discussing the work of this project, the study recited:

> In one instance a 16 year old Navajo girl, pregnant and unmarried, came to Phoenix for her confinement and delivery. Following the child's birth she signed relinquishment papers and returned to the reservation to live. The baby remained in foster care for a few months while we worked to contact the father, who was away in military service. When we did reach him, he expressed great interest in the child and

> resumed contact with the mother. Extended family members then became interested and involved, and ultimately the mother revoked her relinquishment and the child was returned to her. Since that time the young couple has married, and the maternal grandmother is caring for their child. In this particular case the Navajo clan system, which is actively involved in the lives of its members, stepped into [sic] offer a plan that was acceptable to the natural parents and which ensures the child's growing up within his own extended family.

Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs, 95th Cong. 423-24 (1977) ("1977 Senate Hearing"). The report concluded "that dependent children can be kept within the Indian community," *id.* at 426, even when (as in the quoted example) an unwed mother seeks to give up her Indian child at birth and there is, of necessity, no "preexisting Indian family."

Petitioners insist that "Congress passed ICWA to stem the number of Indian children involuntarily removed from their homes by government officials ... without sufficient sensitivity to the family's cultural norms." Pet. Br. 16. But that is only partially true, for (1) Congress certainly intended ICWA to cover *voluntary* proceedings, (§1913), (2) Congress intended ICWA to address problems associated with private placements, and (3) Congress intended to protect the *Tribes'* discrete and compelling interest in tribal children, including in private adoption proceedings. *Holyfield*, 490 U.S. at 49.

Petitioners' incomplete vision of ICWA illustrates a key flaw in the cases that have adopted the existing Indian family doctrine. Like Petitioners, those cases insist that Congress's sole purpose was to protect

Indian children from being removed from Indian homes. *Holyfield* demonstrates otherwise. Noting that Congress made ICWA applicable to voluntary adoptions, and included several provisions protecting tribal rights, this Court concluded that "Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Id.*

Holyfield also undermines Petitioners' argument in another way. The lack of any textual definition of "preexisting Indian family" raises the question of what constitutes a "family" under Petitioners' view of the Act.[11] In the case of an adoption at birth, an Indian child has never lived with an Indian parent or an Indian family, and this is so regardless of which biological parent is Indian. Nevertheless, in *Holyfield* this Court held that ICWA applies in precisely such 'non-family' circumstances: the Indian twins were born off the Choctaw Reservation, they were given up at birth for adoption to a non-Indian couple, and they never lived with either biological parent.

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[11] Petitioners' argument implicitly assumes that "family" should be defined as a nuclear family, not an extended family. Such an assumption about what constitutes a "family" was among the very problems that led to the massive Indian child welfare crisis that Congress sought to end by ICWA. As the House Report stated,

> the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

1978 House Report at 10.

Id. at 39. In *Holyfield*, there was no 'family' (in normal parlance) except the adoptive couple. Yet this Court applied ICWA to protect both the children and the Tribe. *Holyfield* directly forecloses Petitioners' notion that an Indian parent must be a custodian of the child for ICWA to apply.

Not surprisingly, most state courts that have considered the matter after *Holyfield* have rejected the existing Indian family doctrine, including some that had previously endorsed it. *E.g.*, *A.J.S.*, 204 P.3d at 549; *Baby Boy C.*, 805 N.Y.S.2d at 322-23; *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *Michael J., Jr.*, 7 P.3d at 963; *In re Baby Boy L.*, 103 P.3d 1099, 1107 (Okla. 2004); *Baade*, 462 N.W.2d at 489. As these courts have recognized, this Court's understanding of ICWA, including ICWA's protection of tribal interests, leaves no room for an existing Indian family doctrine or a requirement that ICWA only protects custodial parents. *See* Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at 20,* In the Matter of A.J.S., *and the Last Gasps of a Dying Doctrine*, 36 Wm. Mitchell L. Rev. 684 (2010).

III. APPLICATION OF ICWA HERE IS CONSTITUTIONAL.

For 35 years, state courts nationwide have applied ICWA in thousands of child custody proceedings involving Indian children both on and off reservation. This Court applied ICWA in *Holyfield*, and most state courts have applied it broadly, including in many cases where no custodial parent or preexisting Indian family was present. *E.g.*, *Michael J., Jr.*, 7 P.3d 960; *A.J.S.*, 204 P.2d 543; *Baby Boy C.*, 805 N.Y.S.2d 313; *Baade*, 462 N.W.2d 485.

Despite that overwhelming record, Petitioners and GAL urge the Court to ignore ICWA's plain and sweeping language and refuse to apply it in the circumstances presented here. They assert this is necessary to avoid raising constitutional issues concerning both the scope of Congress's power, and the liberty and equal protection concerns that they contend might arise by refusing to order the child back to Petitioners. But this case does not present a proper vehicle for addressing any constitutional issue.

Significantly, Petitioners and GAL advance *no* direct constitutional challenge to ICWA. Rather, all of their arguments rely upon the constitutional avoidance doctrine. Pet. Br. 3, 43-44, 54; GAL Br. 48.[12] But that doctrine only applies when a statute is ambiguous. *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001); *Lewis* v. *United States*, 445 U.S. 55, 65 (1980). Since Congress has spoken clearly in ICWA by providing that the Act applies where an "Indian child" is involved in a "child custody proceeding," there is no basis for reaching any constitutional issue as an aid to construe the statute. Moreover, the Court should not reach out to decide a constitutional question where the parties expressly *abandoned* their constitutional challenges in the lower courts, and have not raised them here in the questions presented. In short, the Court should apply ICWA as written, leaving for another day what, if any, constitutional issues the application of the Act might generate.

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[12] Several of Petitioners' amici contend that ICWA's application here would be unconstitutional. But amici cannot inject an issue into a case where the parties have not presented it. *United States* v. *Dion*, 476 U.S. 734, 746 (1986); *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991).

In any event, Petitioners and GAL face an exceedingly high burden in pressing their constitutional claims. When Congress legislates regarding Indian Tribes, its authority is based on the powers that the Constitution vests exclusively in the federal government to deal with Tribes as political entities, and the United States' unique constitutional and trust obligations to Indians. "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes" which this Court has "consistently described as 'plenary and exclusive.'" *Lara*, 541 U.S. at 200. The source of that power rests in the affirmative grants set out in the Indian Commerce Clause, U.S. Const. art. I, §8, cl. 3, the Treaty Clause, *id.* art. II, §2, cl. 2, as well as the Property Clause, *id.* art. IV, §3, cl. 2. *Lara*, 541 U.S. at 200 (citing *Mancari*, 417 U.S. at 552); *see also United States* v. *Kagama*, 118 U.S. 375, 379-80 (1886); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 62 (1996). It also rests "upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'" *Lara*, 541 U.S. at 201 (citations omitted).

Congress has exercised these powers broadly, for example, to determine tribal membership and Indian status for federal purposes, *see, e.g.*, *Stephens* v. *Cherokee Nation*, 174 U.S. 445, 488 (1899); to determine when Indians, wherever they lived, would be entitled to status as citizens of the United States, *Elk* v. *Wilkins*, 112 U.S. 94, 106-07 (1884); to transfer tribal property to individual Indians, *United States* v. *Seminole Nation*, 299 U.S. 417, 428-29 (1937); and to define Indian eligibility to share in distributions of tribal property, *Del. Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 84-85 (1977). Congress has the power to

completely terminate the federal guardianship over Indian Tribes, *see Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 408 (1968), as well as the power to recognize Indian Tribes that are subject to federal guardianship, *see United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865); *United States* v. *Sandoval*, 231 U.S. 28, 46-47 (1913); *United States* v. *John*, 437 U.S. 634, 652-53 (1978); *Lara*, 541 U.S. at 202, and to decide when and on what terms to maintain that guardianship, *United States* v. *Nice*, 241 U.S. 591, 598 (1916).

Petitioners disregard this Court's broad deference to Congress in dealing with Indian Tribes. Instead, they offer myriad constitutional arguments based on a single erroneous premise: somehow the circumstances presented here, they contend, are not "Indian enough" for ICWA's application to be constitutional. Nothing in the Constitution, and certainly nothing in this Court's rulings, suggests a basis for such a subjective and standardless inquiry. To the contrary, this Court has made clear that Congress has broad powers over Indian affairs, and that it is up to *Congress* to determine the measure of that power's application, including determining who is an "Indian" for federal law purposes. *See Nice*, 241 U.S. at 598-601. Likewise, this Court has repeatedly held that where Congress legislates regarding Indian Tribes or their members (as it has done many hundreds of times for over two centuries), such legislation is based on political association; it is not race-based. *E.g.*, *Mancari*, 417 U.S. at 552; *Antelope*, 430 U.S. at 645-47. Further, this Court has emphasized that membership in an Indian Tribe—the interest at the core of ICWA—is a fundamental aspect of tribal self-government, which Congress unquestionably has plenary authority to protect. *Santa Clara Pueblo* v.

Martinez, 436 U.S. 49, 72 n.32 (1978). Congress in enacting ICWA exercised its powers over Indian affairs, drew a bright line regarding which Indians are covered to ensure it was political and not racial, and underscored the fundamental connection between custody of Indian children and tribal self-government. Petitioners and GAL seek to supersede all those principles with an approach never suggested by this Court, embraced by Congress, or commanded by the Constitution.

Petitioners and GAL would replace Congress's determinations in ICWA with a doctrine under which state courts would usurp congressional authority over Indian affairs and would decide, without any meaningful criteria, whether an Indian is "Indian enough" for ICWA to apply. In this sense, Petitioners and GAL are seeking to constitutionalize the existing Indian family doctrine, under which state courts determine whether the child's family is in some subjective sense "Indian enough." Yet, that doctrine has been roundly criticized precisely for allowing state courts to make ad hoc determinations of how "Indian" a person must be for ICWA to apply. *E.g.*, *In re N.B.*, 199 P.3d 16, 21-22 (Colo. App. 2007); *Baby Boy C.*, 805 N.Y.S.2d at 324; *Quinn* v. *Walters*, 845 P.2d 206, 208-09 (Or. Ct. App. 1993), *rev'd on other grounds*, 881 P.2d 795 (Or. 1994).

There is no basis for stripping Congress of its power over Indian affairs as expressed in ICWA, based on a standardless state court determination of whether an Indian is "Indian enough." Actual membership (or eligibility for membership) in an Indian Tribe is a perfectly reasonable criterion for Congress to use in the exercise of its authority to protect and preserve Indian Tribes.

A. ICWA Does Not Violate Principles Of Equal Protection.

1. Federal Legislation In Indian Affairs Deals With Indians Based On Their Political Status.

Federal legislation concerning Tribes and tribal members is a matter of political association, not race. *Mancari*, 417 U.S. 535. Congress in ICWA legislated specifically with *Mancari* in mind, *see* 1978 House Report at 16-17, and limited ICWA's application to Indians who are members of federally recognized Tribes (and their eligible children). Tribal membership is the touchstone for ICWA's application, §1903(3), (4), and that is a complete answer to Petitioners' contrary argument.

In *Mancari*, this Court sustained a federal employment preference favoring tribal members against a due process and equal protection challenge, reasoning that the classification was not based on race but on "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." 417 U.S. at 551. Finding that "[t]his unique legal status is of longstanding ... and its sources are diverse," *id.* at 555 (citation omitted), this Court explained that "[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized," *id.* at 552. The Court concluded that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the

Indians, such legislative judgments will not be disturbed." *Id.* at 555.

In *Mancari*, the Court found that an Indian employment preference met this standard because it was "reasonably designed to further the cause of Indian self-government and to make the [Bureau of Indian Affairs] more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency." *Id.* at 554. Congress's special treatment of Indians was justified by an interest that was *indirectly* linked to tribal self-government: employment with the federal agency that regulates tribal affairs. By comparison, the interests at stake in ICWA are *directly* tied to the Tribe, for they involve the right to maintain a political relationship with the Tribe itself. Nothing could be closer to tribal rights of self-governance than protection of the right to politically associate with the Tribe and the interests (including cultural, social, property and Treaty interests) that flow from the exercise of that political right.

Since *Mancari*, this Court has regularly reaffirmed that legislation regulating Indian affairs "is not based on impermissible [racial] classifications," but is "rooted in the unique status of Indians as 'a separate people' with their own political institutions," *Antelope*, 430 U.S. at 646, and that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs," *Rice* v. *Cayetano*, 528 U.S. 495, 519 (2000).[13] Based on these principles,

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[13] *Rice*, while reaffirming the vitality of *Mancari*, 528 U.S. at 518, also involved a very different situation in at least two key respects. First, it addressed the unique history of Native Hawaiians, as to which this Court stated "[i]t is a matter of

this Court has rejected equal protection challenges to federal laws that singled out Indians for unique treatment, whether those laws benefitted or burdened Indian interests. These have included federal laws that precluded Indian residents of a reservation from accessing state courts to adjudicate an adoption involving a reservation child, *Fisher*, 424 U.S. at 382, 390-91; subjected Indian criminal defendants to a lesser federal standard of proof than would have been applied if the defendant had been a non-Indian charged under state law, *Antelope*, 430 U.S. at 646-47; allowed a State to assume partial jurisdiction within an Indian reservation, *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501-02 (1979); determined which Indians would share in a distribution of tribal funds, *Del. Tribal Bus. Comm.*, 430 U.S. at 84-85; immunized Indians from state sales taxes, *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-80 (1976); and preempted state law that would otherwise have regulated Indian fishing and hunting outside of Indian reservations, *Washington* v. *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 & n.20 (1979).

Petitioners and GAL do not challenge *Mancari*, Pet. Br. 44; GAL Br. 54, nor do they challenge *Holyfield*, Pet. Br. 42; GAL Br. 55. They presumably recognize that ICWA's application to the twins in *Holyfield* was not unlawful racial discrimination but a matter of

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some dispute ... whether Congress may treat the native Hawaiians as it does the Indian tribes." *Id.* at 518. Second, *Rice* involved a *state* voting scheme that directly affected "the affair[s] of the State of Hawaii" and thus implicated the Fifteenth Amendment. *Id.* at 520, 522. *Rice* did not involve the well-established authority of Congress to legislate for the benefit of federally recognized Indian Tribes, nor did it address a core tribal interest like the custody of tribal children.

political association. Accordingly, if the Indian child in this case had been domiciled on the Reservation, even under Petitioners' and GAL's argument there would be no issue of race.

So, despite their protestations about race, Petitioners' and GAL's arguments actually lie elsewhere. Their core argument is that ICWA's constitutionality turns on whether the facts are "sufficiently tied to the government's interest in preserving tribal connections." Pet. Br. 44. The GAL suggests a similar formulation. *See* GAL Br. 54 (whether the matter is "tethered directly to tribal land or tribal self-government"). These formulations invite a broad departure from *Mancari*'s clear and deferential standard, and they must fail because this child's undisputed status as a child "eligible for membership" in the Cherokee Nation clearly promotes tribal connections and self-government.

Without members, a Tribe ceases to exist. Every eligible member who is removed from her Tribe triggers Congress's core concern in ICWA to preserve the Tribe, a concern well within Congress's authority to address. The only way to avoid this conclusion—and the real argument underlying Petitioners' and GAL's thesis—is to argue that Congress's authority only extends to tribal members who are "Indian enough" in terms of their bond to their Tribe. But as we already have shown, such an utterly subjective standard is no basis for restricting Congress's plenary power over Indian affairs. [14]

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[14] GAL's reliance on *Williams* v. *Babbitt*, 115 F.3d 657 (9th Cir. 1997), is misplaced. That case involved a statute providing a preference for Alaskan Natives with respect to the herding of reindeer. Under the Reindeer Industry Act of 1937, the preference was applied to "natives of Alaska," *which was expressly defined without regard to membership in any Tribe*. 25 U.S.C.

Along these very lines, Petitioners insist that ICWA's application depends on whether "the child could be exposed to Indian culture or tribal politics through her Indian parent." Pet. Br. 45. Like the existing Indian family doctrine, that subjective notion could never be consistently applied by diverse state court judges called to assess whether application of Congress's enactment is, in each case, sufficiently tied to tribal interests to pass constitutional muster. Petitioners themselves concede the issue with respect to the existing Indian family doctrine, noting that "[c]ourts that have rejected the existing Indian family doctrine have criticized the propriety of examining whether a preexisting Indian family is *'Indian' enough* to merit protection under ICWA." Pet. Br. 40 (emphasis added). It is hard to see how Petitioners' "could-be-exposed-to-Indian-culture-or-tribal-politics" standard could possibly fare any better.

2. ICWA Applies To Tribal Indians Based On Political Status, Not Race.

Consistent with *Mancari* and its progeny, ICWA expressly deals with Indians as a political matter,

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§500n. In addition, the preference applied to an industry that was not a part of the traditional "Alaskan native way of life," and the Act provided no rights or benefits to Tribes (as opposed to individual natives of Alaska). *Williams*, 115 F.3d at 659. In this context—where Congress acted without addressing Indian Tribes as political entities—the court considered *Mancari* as likely not applicable with respect to its equal protection analysis. *Id.* at 665. The court therefore determined that, since the Act did not expressly prohibit non-Natives from participating in the reindeer industry, *id.* at 660, an administrative decision to the contrary was incorrect, *id.* at 668. Whether *Williams* was correctly decided or not, it has no application to a statute like ICWA which, as this Court explained in *Holyfield*, directly protects the interests of Tribes and tribal members.

based on tribal affiliation. The Act applies only to children who satisfy the Act's definition of the term "Indian child," which is: "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." §1903(4). ICWA further defines the term "Indian tribe" to apply only to those Tribes that are federally recognized. §1903(8). Such Tribes are identified by lists published annually in the Federal Register. *See* 25 U.S.C. §§479a, 479a-1(a).

Contrary to Petitioners' and GAL's arguments, nothing in ICWA applies to an Indian child based on a child's race. The text of the Act makes this much plain, as it makes no reference to a child's Indian ancestry or blood quantum. Just as in *Holyfield*, where the Court dealt with "the twins [who] were 'Indian children'" without addressing their blood quantum or race, 490 U.S. at 42, this case does not concern Baby Girl's or her Father's race. Like the tribal member employment preference in *Mancari*, ICWA turns only on a child's membership (or eligibility for membership) in a Tribe that has been federally recognized. Given that Congress's definition of "Indian child" is tied explicitly to membership in a Tribe, without any regard to the child's "blood," it follows *a fortiori* from *Mancari* that Congress's classification is not racial. As applied in the Cherokee context, the situation is akin to that under the United States Constitution: a person who is born of a U.S. citizen is herself a U.S. citizen. No one thinks that such a right of citizenship by descent is in any manner racial, nor insists that there must be a clearer nexus to the nation before the citizenship right may arise.

As a result of Congress's careful calibration in ICWA, many persons of Indian ancestry are excluded. ICWA does *not* apply to children who may have Indian ancestry but cannot trace that ancestry to an ancestor's membership in a federally recognized Tribe, *cf. Rice*, 528 U.S. at 518, or who—even with such ancestry—do not satisfy the relevant Tribe's membership requirements, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 52. Even for children who are eligible for membership in a Tribe, ICWA further narrows its scope only to those who are also the biological child of a tribal member. If a parent, though eligible to enroll, either failed to do so or elected to relinquish membership in the Tribe, the child, even if eligible for membership, is not covered by ICWA.

The fact that ICWA specifically requires Indian children to be members of (or eligible for membership in) a "federally recognized" Tribe further underscores the political nature of the determination. Federal recognition is grounded in the continuing existence of a tribal community which maintains a government-to-government relationship with the United States. *See, e.g.*, *Carcieri* v. *Salazar*, 555 U.S. 379, 397-99 (2009) (Breyer, J., concurring) (documenting recognized Tribes' ongoing cohesion and interaction with the federal government); *accord* 25 U.S.C. §479a-1(a). Many persons of Indian descent are not members of, nor eligible to enroll in, a federally recognized Tribe. *See Del. Tribal Bus. Comm.*, 430 U.S. at 85; *see also United States* v. *Eagleboy*, 200 F.3d 1137, 1138 (8th Cir. 1999). By limiting ICWA only to children who have enrolled, or who are eligible to enroll, in a federally recognized Tribe, Congress understood that an eligible "Indian child" like Baby Girl might enroll in her Tribe and thereby affiliate politically with a

tribal entity that itself maintains a government-to-government relationship with the United States.

In the end, Petitioners and GAL are left casting aspersions on the Cherokee Nation's enrollment standards. But it is not for Petitioners or GAL (and certainly not state courts) to determine appropriate standards for tribal membership. On that issue, Congress deferred to the Tribes, a judgment which this Court has observed the Judiciary must respect. *Santa Clara Pueblo*, 436 U.S. at 72 & n.32.

3. Application Of ICWA Here Is Rationally Tied To Fulfillment Of The Federal Government's Unique Obligation To Indian Tribes.

Mancari and its progeny provide that a congressional enactment in Indian affairs meets the requirements of the Equal Protection Clause where it is rationally tied to the fulfillment of the government's unique obligations to Indians. The federal government's most fundamental obligation in Indian affairs is to protect the right of tribal self-government. *E.g.*, *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986) ("Congress' jealous regard for Indian self-governance"); *Santa Clara Pueblo*, 436 U.S. at 62 (Congress's "commitment to the goal of tribal self-determination"). This Court has consistently recognized that decisions on tribal membership and enrollment go to the core of tribal sovereignty and tribal identity, and have "long been recognized as central to [a Tribe's] existence as an independent political community." *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *accord United States* v. *Wheeler*, 435 U.S. 313, 322 n.18 (1978) ("[U]nless limited by treaty or statute, a tribe has the power to determine tribe membership."); *Roff* v. *Burney*, 168 U.S. 218, 222

(1897) ("The citizenship which the Chickasaw legislature could confer it could withdraw.").

Prior to ICWA's passage, the obligation of the United States to protect the future existence of Tribes as self-governing entities was jeopardized by hostile child custody practices. A comprehensive record developed by Congress revealed the disproportionately high number of Indian children then being raised in non-Indian, non-familial homes, and that widespread discrimination by public and private child welfare agencies impacted both involuntary and voluntary placements. *Holyfield*, 490 U.S. at 45 n.18, 50 n.25; 1978 House Report at 10-11. The record before Congress also showed that agencies used coercive and deceptive tactics to secure what were inaptly referred to as "voluntary waivers of parental rights." 1978 House Report at 11; *accord* 1974 Senate Hearings at 68. Further, some private agencies and adoptive and foster parents were motivated by financial incentives to place and adopt Indian children. 1978 House Report at 11; 1974 Senate Hearings at 118, 119; *see also* 123 Cong. Rec. 21,043 (1977) (remarks of Senator Abourezk that "demand for Indian children has increased dramatically"). Discriminatory standards also affected foster care and adoption placements, making it "virtually impossible for most Indian couples to qualify as foster or adoptive parents." 1978 House Report at 11. These kinds of biases and the failure to understand "the cultural and social standards prevailing in Indian communities and families," §1901(5), still exist and were very much at issue in this case. *See, e.g.*, JA 104, 106, 113, 146-148.

The separation of Indian children from their families and Tribes also gave rise to concerns about the "loss of [the Indian child's] right to share in the

cultural and property benefits of membership in his tribe." 124 Cong. Rec. 38,103 (1978) (remarks of Rep. Lagomarsino). Tribal witnesses testified about the difficulty for adopted children in securing information necessary to enroll and obtain benefits and inheritance rights that would otherwise follow tribal membership. *Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 75, 130 (1978) ("1978 House Hearings"); *see also* 1974 Senate Hearings at 166 (social worker denied Indian mother's request to have her children who were removed from her to be placed on the tribal roll).

The record further demonstrated that the problem was nationwide, occurring both on-reservation and off. Congress learned of the tragic impact of earlier federal policies which had led to the involuntary relocation of many Indians off-reservation. For example, although officially described as "voluntary," federal relocation programs in the 1950s and 1960s "pressured the Indians into relocating" to cities such as Chicago, Los Angeles and Minneapolis, without adequate preparation for the change.[15] The relocation program directly affected the Cherokee Nation. Wilma Mankiller, the only female Chief of the Cherokee Nation, was twelve years old when her family relocated to California under the federal Indian relocation program. After much struggle, she eventually made her way back to Oklahoma to become Chief of the Cherokee Nation in 1985. Wilma

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[15] 1978 House Hearings at 103-07; *see also* Am. Indian Policy Review Comm'n (AIPRC), *Final Report to Congress* 429-33 (1977); *Indian Education: A National Tragedy—A National Challenge, Special Subcommittee on Indian Education of the Senate Committee on Labor and Public Welfare*, S. Rep. No. 91-501, at 163 (1969).

Mankiller & Michael Wallis, *Mankiller: A Chief and Her People* (1993).

Other federal programs, specifically targeting Indian children, led to the further decline of Indian families and communities. Congress was presented with evidence that federal use of boarding schools had "contribute[d] to the destruction of Indian family and community life." 1978 House Report at 9. From the 1880s into the 1950s, this policy undermined reservation life by placing Indian children in off-reservation boarding schools. This particularly cruel policy had as its objective "to separate a child from his reservation and family, strip him of his tribal lore and mores, force the complete abandonment of his native language, and prepare him for never again returning to his people."[16]

Another federal policy, known as the "Indian Adoption Project," in effect from 1958 into the early 1970s, actively sought to adopt Indian children through private and state agencies to non-Indian parents. 1977 Senate Hearing at 182, 415; *see also* Francis Paul Prucha, *The Great Father: The United States Government and the American Indians,* 1153-54 (1984). The 1977 American Indian Policy Review Commission's comprehensive report to Congress leveled special attention at this problem:

> The policy of removing Indian children from their homes and tribal settings to "civilize" them

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[16] S. Rep. No. 91-501, at 12; *see also* AIPRC Task Force Eight, *Report on Urban and Rural Non-Reservation Indians Final Report to the American Indian Policy Review Commission,* 25 (1976) ("The sites of these schools were determined ... by the conscious intention of forcing a separation between Indian parents and children and between Indian children and the idea of the reservation.").

> began in the 1880's with the advent of boarding schools. Indian children are still being removed from their tribal culture. Today, however, this is done through the adoption of Indian children by non-Indian families and their placement in non-Indian foster care homes and institutions.

S. Rep. No. 95-597, at 39 (1977), *reprinting excerpts from* AIPRC, *Final Report to Congress* (1977).

Overall, the record before Congress demonstrated that these and other policies and practices posed a concrete threat to the very existence of the Tribes. Indian Tribes were "being drained of their children and, as a result, their future as a tribe and a people [was] being placed in jeopardy." 124 Cong. Rec. 38,102 (1978) (remarks of Rep. Udall). As this Court recognized, quoting the testimony of one tribal leader:

> "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People.... [T]hese practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships."

Holyfield, 490 U.S. at 34 (quoting 1978 House Hearings at 193 (testimony of Calvin Isaac, Tribal Chief of Mississippi Band of Choctaw Indians)); *see also* 1978 House Report at 19 (noting "the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future"); *id.* at 23 (legislation "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian

community and tribe in retaining its children in its society").

ICWA is an eminently rational congressional response to this tragedy of epic proportions. The interests that ICWA protects—a child's interest in the political, property, Treaty and cultural rights that flow from membership with her Tribe, and the Tribe's concomitant interest in ensuring that children who are members (or eligible for membership) retain their rights as tribal members—are tightly bound up in principles of tribal self-governance that Congress sought to address. As Congress recognized, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." §1901(3). An Indian child placed with her Indian parent (or another tribal member), will grow up to have the right to vote in tribal elections, run for tribal office, share in tribal assets, use tribal lands, exercise tribal Treaty rights, partake in tribal cultural activities, and otherwise participate (to the extent she wishes) in the life of the Tribe. The same child, placed elsewhere, could lose all these opportunities. All of this implicates the kind of political interests that this Court held in *Mancari* are a legitimate object of Congress's attention under its broad constitutional powers over Indian affairs.

As for the inclusion of children "eligible" for membership, this was a practical necessity:

> This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanical procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing there from. Obviously, Congress has power to act for their protection. *The constitutional and plenary power of Congress over Indians and Indian tribes*

> *and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority, cannot make a reasoned decision about their tribal and Indian identity.*

1978 House Report at 17 (emphasis added). In so doing, Congress also carefully considered this Court's decision in *Mancari* and the federal government's broad constitutional powers in Indian affairs. *Id.* at 16-17.

The interests Congress sought to advance in ICWA do not terminate when an Indian is outside the reservation. Congress determined, based on the record before it, that its purpose of protecting tribal survival across generations does not end at the border of the reservation.[17] Instead, Congress recognized that tribal integrity rests on notions of Indian community that are distinct from "Indian Country." This case is a good example of that approach being vindicated, for Baby Girl today lives in the heart of an Indian community and in the care of her Indian family. Congress's determination to protect that child and

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[17] In ICWA, Congress authorized funds for off-reservation Indian child and family service programs. §§1932, 1933. ICWA is one among many federal statutes that protects the interests of Tribes and their members outside of Indian reservations. *See, e.g.*, 25 U.S.C. §§1651-1660h (authorizing federal funds for urban Indian health care); 25 U.S.C. §§3001(8), 3003-3005 (requiring museums, States and local agencies to repatriate Native American human remains and cultural objects); 25 U.S.C. §§305a-305e (protecting Indian artists from others who falsely represent a work as Indian-made); 42 U.S.C. §1996a (exempting from criminal prosecution use of peyote by traditional Indian religious practitioners).

the Tribe does not run afoul of any provision of the Constitution.

Congress's determination to apply ICWA nationwide was also consistent with the need for uniformity. *Holyfield*, 490 U.S. at 44-47. The sometimes fortuitous nature of where child custody proceedings take place is illustrated by this case. Both parents live and the child was born in Oklahoma, within a Cherokee community where the Cherokee Nation provides extensive services to Cherokee citizens. Nevertheless, her custody was adjudicated in South Carolina—it might have been anywhere—simply because that happened to be the residence of the couple petitioning for adoption. Neither the Tribe nor the Father could have predicted such a development. Even then, the location of the child custody proceeding was impacted by a series of procedural issues that affected whether the Cherokee Nation and state authorities were properly informed of the child's status as an Indian child. *See* Pet.App. 19a.

As the facts here underscore, the place where an Indian child custody proceeding occurs is often a matter of chance. Congress reasonably determined that uniform federal standards were required precisely to avoid inconsistencies in state law in determining the future of Indian Tribes. In so doing, Congress took action analogous to other statutes that establish uniform federal standards for determining jurisdiction and choice of law when more than one sovereign has an interest in a child custody proceeding. *See, e.g.*, *Thompson* v. *Thompson*, 484 U.S. 174, 180-81 (1988) (addressing the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. §1738A); *Abbott* v. *Abbott*, 130 S. Ct. 1983 (2010) (addressing the International Child Abduction Remedies Act, 42 U.S.C. §§11601-11611).

In sum, there is no equal protection violation here. Congress enacted ICWA based on a comprehensive record demonstrating that the future of Tribes as self-governing entities was threatened by child custody practices across the 50 States. Exercising its plenary constitutional authority over Indian Tribes, Congress reasonably tailored a response to the problem that addressed the matter in terms of political association. In addressing core tribal interests—membership, and the political, property and other rights that flow from membership—Congress acted rationally in furthering its unique obligations to the Tribes.

B. Application Of ICWA Here Does Not Violate The Mother's Liberty Interests Or Substantive Due Process Rights.

While the Petitioners contend that ICWA's application would violate the Mother's liberty interests in raising a child, Pet. Br. 48, no such claim regarding the Mother was raised at any time in the proceedings below. In any event, from before the time Baby Girl was born, Mother consistently *disclaimed* any interest in raising her. She relinquished her parental rights. JA 22-24. While a parent has a fundamental liberty interest in raising a child, *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000), that interest does not continue after a parent relinquishes all parental rights. At that point, child custody becomes a matter of statutory law. To be sure, the views of a biological parent regarding the adoptive placement of a child may be considered, under both state law and ICWA. *See* 44 Fed. Reg. at 67,594. But such a parent's views are by no means determinative and they warrant no constitutional protection.

Petitioners' argument focuses on the unquestionably difficult choices that an unmarried woman who

becomes pregnant must make, decisions which can be all the more complicated if she is estranged from the biological father. But that is the case whether or not the child is an Indian child under ICWA. In any event, ICWA reflects a comprehensive and reasonable determination by Congress regarding how to accommodate the competing interests involved in Indian child custody proceedings, and a mother who chooses to relinquish all legal rights to raise her child has no fundamental liberty interest to challenge Congress's judgments.

C. Application Of ICWA Here Does Not Violate The Child's Liberty Interest Or Substantive Due Process Rights.

Petitioners and GAL argue that ICWA's application violated the child's liberty interests. Pet. Br. 49; GAL Br. 50, 56-58. But even Petitioners concede that this Court has never addressed "'a child's liberty interest in preserving established familial or family-like bonds.'" *See* Pet. Br. 49 (citing *Troxel*, 530 U.S. at 88 (Stevens. J., dissenting), and *Michael H.* v. *Gerald D.*, 491 U.S. 110, 130 (1989) ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintain her filial relationship.")). In nonetheless treading into this ill-defined area, they insist that to apply ICWA here would unconstitutionally deprive Baby Girl of a placement that would be in her best interests. Their argument fails to recognize that (1) the child's rights in this context are first and foremost rights to a relationship with her Father, and (2) ICWA, by incorporating a "good cause" standard into §1915(a), already protects whatever liberty interest the child may have regarding custody determinations. *See DeShaney* v. *Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189 (1989).

First, Petitioners' and GAL's argument conflates two separate inquires. Before the lower court could determine whether the child should be placed with the adoptive couple, the court had to determine whether the Father had rights as a parent, and, if he did, whether those rights should be terminated. If the Father had parental rights, those rights were constitutionally protected and could not be terminated unless he was shown to be unfit. *Santosky* v. *Kramer*, 455 U.S. 745, 753-54 (1982). A child's interests in a filial relationship exists most significantly in her relationship with her natural parents, including her Father, absent a judicial determination that her Father either possessed no parental rights or should have those rights terminated. But so long as parental rights exist, "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760.

Without doubt, a child who is temporarily placed in a foster care or preadoptive home pending a full adjudication of the parents' rights (as occurred here, JA 57, 59), may develop bonds to her custodians. But temporary custody of a child is a matter of statutory law, not constitutional right. *Smith* v. *Org. of Foster Families for Equal. & Reform,* 431 U.S. 816, 845-46 (1977). As a result, "whatever emotional ties may develop" during a temporary placement, those relationships are always subject to the substantive liberty interests of the Father who, if he has established rights as a parent, "has an absolute right to the return of his child in the absence of a court order obtainable only upon compliance with rigorous substantive and procedural standards, which reflect the constitutional protection accorded the natural family." *Id.* at 845, 846. Once found to be a parent,

the Father's fitness as a parent is not measured by comparison with other placement options; it is judged on its own merit. *See Reno* v. *Flores*, 507 U.S. 292, 304 (1993).

Second, their argument misconstrues how ICWA operates and how it was applied here. ICWA provides for presumptive placement in accordance with certain preferences, while allowing state courts to depart from those preferences based on "good cause." §1915(a). The "good cause" analysis provides full protection for the child's interests. The lower court took care to account for the child's best interests. After seeing the witnesses at trial, the Family Court specifically found that "[Father] is the father of another daughter. The undisputed testimony is that he is a loving and devoted father. Even [Mother] herself testified that [Father] was a good father. There is no evidence to suggest that he would be anything other than an excellent parent to this child." Pet.App. 126a-127a. The Family Court added that:

> Parental rights are fundamental rights that are to be protected. Santosky v. Kramer, 455 U.S. 745 ... (1982). I find that [Father], the birth father is a fit and proper person to have custody of his child. He has demonstrated that he has the ability to parent effectively, based upon his relationship with his other daughter. [Father] has convinced me of his unwavering love for this child.

Pet.App. 127a-128a. The South Carolina Supreme Court affirmed these findings, Pet.App. 31a, 36a-37a, and in so doing rejected the dissent's view that the family court had applied ICWA to "eclipse[] the family court's obligation to determine what would be in the child's best interests," Pet.App. 36a n.29. In sum, application of ICWA here did not violate the

child's liberty interests or substantive due process rights.

At core, Petitioners' and GAL's argument is premised on their view of the *evidence*, a view that was rejected by the Family Court and the South Carolina Supreme Court and is not subject to review here under the Court's two-court rule. *See, e.g., Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 840-41 (1996) ("application of law to fact, ... is left to the factfinder, subject to limited review.... 'A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.'"); *see also United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

D. Application Of ICWA Does No Violence To Federalism.

Although no State has stepped forward and complained about the South Carolina Supreme Court's holding in this case, Petitioners nevertheless contend that applying ICWA here violates federalism concerns by infringing on traditional states' rights in the field of domestic relations. Pet. Br. 49-51. Significantly, neither South Carolina nor *any* other State filed a brief in support of Petitioners here, which suggests that the federalism claim lacks merit.

What makes Petitioners' federalism concerns particularly overblown is that no one can identify which state laws are implicated. Petitioners contend that ICWA's application here "creat[ed] a new federal class of parents that consists of unwed fathers holding no parental rights under state law" and, as such,

is in derogation of state authority in domestic affairs. Pet. Br. 50. But state laws differ considerably on when an unwed father is a "parent," and an unwed father may have greater (or lesser) rights as a parent depending on where the matter is adjudicated. *See* Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (and Other Parenthood) After* Lehr *and* Michael H, 43 U. Tol. L. Rev. 225, 249-50 (2012).

Certainly the record before Congress supports its decision to apply a uniform standard for Indian chil. custody proceedings in state courts. The diverse application of state law regimes would frustrate Congress's purpose in securing to Tribes and Indian children security in their vital relationships. *Holyfield*, 490 U.S. at 45-46. ICWA (like other federal laws establishing uniform standards for certain child custody proceedings, *see supra* at 47) responds to a pressing problem where the federal government has an overriding interest in the application of uniform law.[18]

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[18] Petitioners cite to concerns expressed by Judge Wald, then Assistant Attorney General, during congressional consideration of ICWA about the extent to which federal legislation could apply to custody proceedings involving Indian children in state courts off-reservation. Pet. Br. 50-51 (citing 1978 House Report at 40). Judge Wald's concerns in this regard were stated generally, without any reference to this Court's rulings with respect to the scope of federal power over Indian affairs. Congress responded to those concerns by undertaking a careful examination of this Court's precedent, which strongly supports Congress's conclusion that its constitutional power to legislate in Indian affairs may properly preempt state law and apply to Indians both within and outside of Indian reservations as set forth in ICWA. 1978 House Report at 12-15. Congress correctly determined that the child welfare crisis threatened the future viability of Indian Tribes and that this problem required a comprehensive nationwide solution. Contrary to Judge Wald's general view, Congress reasonably determined that enactment

No one disputes that States have an interest in child custody matters. But under the Constitution, States have no interest in matters affecting tribal membership or internal tribal relations. The Constitution conveyed all such power to the federal government, *Seminole*, 517 U.S. at 62; *United States* v. *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194-95 (1876), and pursuant to its constitutional authority over Indian affairs, Congress has for two centuries enacted measures for Indians that touch upon core state interests, *e.g.*, *Antelope*, 430 U.S. at 648 (criminal law); *Perrin* v. *United States*, 232 U.S. 478, 485 (1914) (alcohol regulation); *Ramah Navajo Sch. Bd. Inc.* v. *Bureau of Revenue*, 458 U.S. 832 (1982) (schools); *Bd. of Cnty. Comm'rs* v. *Seber*, 318 U.S. 705, 718 (1943) (property taxes); *Moe*, 425 U.S. at 479-81 (sales and tobacco taxes). Federal authority to legislate regarding Indians, and to preempt state law, has frequently included matters impacting Indians outside of Indian country. *E.g.*, *Perrin*, 232 U.S. at 485; *Seber*, 318 U.S. at 718; *Antoine* v. *Washington*, 420 U.S. 194, 205-06 (1975). Given the plenary nature of Congress's authority in Indian affairs, the Act as applied here does not implicate federalism concerns.

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of ICWA was based on an important federal interest—the protection of tribal self-governance and the future survival of Indian Tribes.

CONCLUSION

For the foregoing reasons, the judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Petition for a Writ of Certiorari to the South Carolina Supreme Court

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QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-63, applies to state custody proceedings involving an Indian child. A dozen state courts of last resort are openly and intractably divided on two critical questions involving the administration of ICWA in thousands of custody disputes each year.

(1) Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

(2) Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

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STATEMENT OF THE CASE

At issue in this case is an important question of federal law that implicates thousands of custody disputes every year: whether the Indian Child Welfare Act operates to block adoption proceedings voluntarily initiated by a non-Indian mother who has sole custody of her child due to the Indian father's failure to establish a legal parent-child relationship with the child under state law. The Guardian ad Litem, Ms. Jo M. Prowell ("the Guardian"), is the duly appointed representative of the respondent child ("Baby Girl") in these proceedings, with standing to file this brief on Baby Girl's behalf. The Guardian exhaustively considered the respondent child's best interests and concluded that they clearly would be served by allowing her adoptive parents to retain custody. But under the South Carolina Supreme Court's interpretation of the Act, the respondent child's best interests were overridden by a federal law that in this case operated solely on the basis of race, not any meaningful connection to tribal sovereignty or lands. Both because of the broader jurisprudential significance of the issues presented and because of the dramatic impact on the respondent child, it is imperative that this Court grant plenary review.

At approximately six months pregnant, the birth mother in this case ("Birth Mother") received a text message from respondent Birth Father, stating his desire to relinquish any parental rights to their unborn child, respondent Baby Girl. Pet. App. 4a. Unable to care for Baby Girl by herself, Birth Mother decided that it would be in Baby Girl's best interest

to be adopted by petitioners. *Id.* Petitioners financially supported Birth Mother during her final months of pregnancy, spoke to her weekly, and traveled from South Carolina to Oklahoma to visit her. *Id.* at 5a. Petitioners were in the delivery room when Birth Mother delivered Baby Girl and cared for Baby Girl as their child from that moment forward. *Id.* at 7a.

Following his text message, Birth Father made no attempt to contact or support Birth Mother or Baby Girl, and gave no indication that he was interested in any sort of relationship with Baby Girl, until he was served with petitioners' adoption complaint approximately four months after Baby Girl's birth. *Id.* at 8a. It is uncontested that under South Carolina state law, Birth Father's unequivocal and willful emotional and financial abandonment of Birth Mother and Baby Girl during the pregnancy and first four months of Baby Girl's life dissolved any legal parent-child relationship that would have rendered his consent necessary to finalizing Baby Girl's adoption by petitioners. *Id.* at 21-22a; S.C. Code § 63-9-310(A)(5). Birth Father argued, however, that as a member of the Cherokee Nation, he could invoke the Indian Child Welfare Act ("ICWA") to block the adoption. Pet. App. 10a n.12.

The Guardian ad Litem was appointed pursuant to state law "to represent[] the interests of Baby Girl" in the adoption proceedings. *Id.* at 10a-11a. Because the family court has not modified or terminated the Guardian's appointment, she maintains an ongoing responsibility to serve as Baby Girl's representative. South Carolina law requires the Guardian to "protect

and promote the best interests of the child until formally relieved of the responsibility by the family court." S.C. Code Ann. § 63-11-510(7); *see also id.* § 63-11-530(A)(1) ("The obligation of the guardian ad litem to the court is a continuing one and continues until formally relieved by the court."). The Guardian is specifically authorized by state law to "seek judicial review," *id.* § 63-11-510(6), "submit briefs . . . on behalf of the child," *id.* § 63-3-830(B), and to "participate in the proceedings to any degree necessary to represent the child adequately," *id.* § 63-11-530(C).

Pursuant to her appointment, the Guardian undertook an investigation to determine the best interests of Baby Girl. In addition to reviewing numerous home studies and reports, the Guardian interviewed petitioners at their home in South Carolina and observed their interactions with Baby Girl. The Guardian also traveled to Oklahoma to meet and interview the Father, as well as his parents and a daughter from a previous relationship. Pet. App. 71a.

Based on this thorough investigation, the Guardian concluded that it was in the best interests of the respondent child to remain in the care and custody of the Adoptive Couple. *Id.* at 51a. She found that Baby Girl was a well-adjusted and emotionally secure child with the benefit of two loving adoptive parents. *See id.* at 71a. In contrast, the Guardian expressed concerns about Birth Father's interest in establishing paternity, explaining that she found no evidence that Birth Father had been prevented from establishing his

parental rights before Baby Girl's birth, or that he had attempted to be present at the child's birth or even inquired about the child or Mother's health thereafter. *See id.* at 71a-72a. The Guardian also found no evidence that the Father made reasonable efforts to provide financial support on behalf of the Mother or Baby Girl, or that he had developed a parenting plan that would enable him to provide for Baby Girl himself, rather than relying on his parents. *Id.* Applying the traditional state-law criteria for protecting the best interests of the child, the Guardian concluded that they clearly favored leaving Baby Girl in the custody of her adoptive parents.

By the time the adoption proceeding was tried in September 2011, Baby Girl was two years old and had lived with petitioners her entire life. *Id.* at 10a. The Guardian testified that it was her factual finding that Baby Girl's well-being would be best served by approval of the adoption. *See id.* at 51a. Birth Mother also urged the court to finalize the adoption. *Id.* at 46a. The Cherokee Nation intervened in support of Birth Father. *Id.* at 10a.

The family court denied the adoption petition and ordered custody of respondent Baby Girl transferred to Birth Father. *Id.* at 11a. The court acknowledged that under South Carolina state law, Birth Father's abandonment of Birth Mother and Baby Girl extinguished any legal status he otherwise would have had to contest the adoption, but held that because Birth Father was Indian, he could invoke ICWA's parental termination provision to block the adoption. *See id.*; 25 U.S.C. § 1912(f). The court thus ordered petitioners to surrender Baby Girl to Birth

Father. On December 31, 2011, petitioners handed over Baby Girl, then 27 months old, to Birth Father, whom Baby Girl had never met. Pet. App. 11a. It is the Guardian's understanding that Birth Father allowed Baby Girl to speak with petitioners by telephone the following day, and then cut off all communication between them.

A fractured South Carolina Supreme Court upheld the transfer of Baby Girl's custody.[1] The majority recognized, like the family court, that South Carolina state law would not even recognize Birth Father as a parent with standing to contest the adoption, but nonetheless found ICWA's special parental termination provision for "Indian parents" applicable to the proceedings. *Id.* at 21a-22a; *see* 25 U.S.C. § 1912(f). Under ICWA, the court explained, Birth Father's "lack of interest in or support for Baby Girl during the pregnancy and first four months of her life . . . is not a valid consideration." Pet. App.

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[1] The Guardian initially filed a brief in the South Carolina Court urging reversal of the trial court's decision to apply ICWA to the custody proceedings. She subsequently withdrew her brief after deciding that Baby Girl would be better served if the South Carolina Supreme Court were only asked to address the arguments raised by petitioners in their appeal. The Guardian's withdrawal of her brief did not have any effect on Baby Girl's status as a party in the case or the Guardian's continuing representation of Baby Girl. *See* S.C. Code Ann. § 63-11-530(A)(1) ("The obligation of the guardian ad litem to the court is a continuing one and continues until formally relieved by the court."); *id.* § 63-11-530(C) (authorizing the guardian ad litem to "participate in the proceedings to any degree necessary to represent the child adequately").

32a n.26. The majority did not even address, let alone dispute, the Guardian's findings that Baby Girl's interests would be best served through adoption by petitioners; instead, the majority explained that "ICWA presumes that placement within its ambit is in the Indian child's best interests." *Id.* at 39a.

Two of the five justices vehemently dissented, explaining that the majority had "decide[d] the fate of a child without regard to *her* best interests and welfare." *Id.* at 41a. The dissenting justices accused the majority of "creating the illusion that Father's interests are in harmony with the best interests of the child," when "[t]he reality is Father purposefully abandoned this child." *Id.* at 42a. The dissenting justices also noted the testimony of Dr. Bart Saylor, a qualified expert in familial bonding, who explained that "severing the bond Baby Girl has formed with [the adoptive parents] would, beyond a reasonable doubt, be 'very traumatic,' ... 'taking away everything she had come to know and count on for her comfort and security and replac[ing] it with something that would be completely unfamiliar and strange to her ... taking away what has been the very source and foundation of her security in her life." *Id.* at 75a (quoting Dr. Saylor).

REASONS FOR GRANTING THE PETITION

As Baby Girl's representative in this case, the Guardian agrees with petitioners that this Court should grant review of the South Carolina Supreme Court's decision. As the Petition explains, the questions presented are at the center of a deep and widely acknowledged conflict among state courts.

Pet. 11-17. And because the conflict concerns the interpretation of a federal law applied exclusively by state courts, this Court's review is the only hope for restoring uniformity among the hundreds of state courts tasked with applying the Indian Child Welfare Act ("ICWA"). But the need for this Court's review goes beyond resolving the typical conflict among courts on how to apply federal law. For respondent Baby Girl and others like her, the issues presented in the Petition go to the heart of their liberty interests in maintaining the only family relationship that they have ever known, and in having the benefit of a custody inquiry truly focused on their best interests. Indeed, in this case, because respondent Baby Girl's only connection to tribal sovereignty considerations were severed by Birth Father's voluntarily abandonment of her, her best interests were disregarded below based solely on her race. This case thus implicates both respondent Baby Girl's most fundamental rights and constitutional concerns of the highest order.

At the center of this case is a little girl who at 27 months old lost the only family she had ever known, her custody transferred from "ideal parents who have exhibited the ability to provide a loving family environment," Pet. App. 40a, to the biological father she had never met because he had abandoned her before birth and shown no interest in her before finding out, four months after Baby Girl was born, that the biological mother had placed her in an adoptive home, *id.* at 8a-9a. The South Carolina Supreme Court recognized that under South Carolina state law, Birth Father's abandonment of Baby Girl dissolved any legal parent-child relationship that

might have given him standing to contest her adoption. *Id.* at 21a n.19. The court nonetheless found that because Birth Father is Indian, he could invoke ICWA to block the adoption and acquire custody of Baby Girl. *Id.* at 22a. The court reached this conclusion based on an interpretation of ICWA that not only ignores the Act's plain meaning and purpose, but, if correct, would render the Act unconstitutional.

A. The South Carolina Supreme Court's Interpretation of ICWA Conflicts with the Act's Terms

According to the court, the determinative provision of ICWA mandating the custody transfer in this case is section 1912(f), which provides that "[n]o termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). Applying this provision, the court concluded that Birth Father was entitled to custody of Baby Girl because, despite his expressed desire to relinquish his parental rights and his failure to show any interest in Baby Girl until he was told about the adoption proceedings, the record did not establish beyond a reasonable doubt that his custody of Baby Girl would result in serious emotional or physical damage. Pet. App. 29a. The court acknowledged Dr. Saylor's expert testimony that the custody transfer would inflict serious emotional harm on Baby Girl,

but found that this testimony established that Baby Girl would be emotionally harmed as a result of her removal from her adoptive home, not from her placement in Birth Father's care, and therefore that conceded harm to the respondent child was simply irrelevant to the section 1912(f) inquiry. *Id.* at 29a-32a.

That determination was riddled with error. As an initial matter, the court erred in failing to recognize that Birth Father is not a "parent" within the meaning of ICWA. Section 1903(9) of the Act defines "parent" as "any biological parent or parents of any Indian child" except for "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). As explained in the Petition, in cases where an Indian man has a child with a non-Indian woman who is not his wife, he is a "parent" under ICWA only if he has established a legal parent-child relationship with the child under state law. *See* Pet. 21-27 (noting legislative history indicating Congress's intent that ICWA's definition of parenthood for unwed fathers "be limited to those who showed the requisite support under state law"). The Birth Father's express abandonment of Baby Girl should have made this an easy case: South Carolina law does not recognize Birth Father as a legal parent with standing to contest Baby Girl's adoption. Pet. App. 21a n.19. Moreover, by its own terms, section 1912(f) only applies where the Indian parent already has some level of custody over the child. *See* 25 U.S.C. § 1912(f) (discussing only the "*continued* custody" of the child by the Indian parent (emphasis added)).

B. The South Carolina Supreme Court's Interpretation of ICWA Raises Serious Equal Protection Concerns

By making the application of section1912(f) to unwed fathers contingent on whether the father demonstrated sufficient interest in the child to establish a legally cognizable parent-child relationship, Congress harmonized the provision with ICWA's purpose of preventing "harm to Indian parents and their children who were *involuntarily* separately by decisions of local welfare authorities." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34 (1989) (emphasis added).[2] Equally important, if Congress had not excluded unwed fathers who fail to legally establish paternity from ICWA's protections, the Act would suffer from serious constitutional problems. *See* Pet. 26-27. As interpreted by the court below and applied in this case, ICWA overrides the best interests of the child based on one factor and one factor alone – the race of the child's birth father, thus raising serious equal protection concerns. To be sure, "Congress may

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[2] This Court's decision in *Holyfield* addressed an entirely separate provision of ICWA, section 1911(a), establishing exclusive tribal jurisdiction over child custody proceedings involving Indian children domiciled on tribal land. *See Holyfield*, 490 U.S. at 30. The question in that case was whether Indian parents domiciled on tribal land may avoid having their child domiciled on tribal land, and thus avoid tribal jurisdiction over the child's adoption placement, simply by leaving the reservation to give birth and never taking the child to the reservation. *Id.* It is undisputed that section 1911(a) has no application to this case.

fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs," *Rice v. Cayetano*, 528 U.S. 495, 519 (2000), including legislation that "single[s] out Indians for particular and special treatment" designed "to further Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). Thus, in *Mancari*, this Court upheld a racial preference for Indians in hiring by the Bureau of Indian Affairs because that agency governs the "lives and activities" of Indians "in a unique fashion." *Id.* at 554. The Court emphasized, however, that it would be an "obviously more difficult question" if Congress were to extend that preference to other government agencies or create "a blanket exemption for Indians from all civil service examinations." *Id.*

The key to whether legislation involving Indians triggers the relaxed review of *Mancari*, or the exacting scrutiny traditionally demanded of classifications based on race, is whether the challenged legislation "relates to Indian land, tribal status, self-government or culture." *Williams v. Babbitt*, 115 F.3d 657, 664-65 (9th Cir. 1997). When a racial classification is tethered directly to tribal land or tribal self-government, the political and racial aspects of the regulation are inextricably intertwined such that treating the laws as involving ordinary racial classifications would deny the federal government its authority under the Treaty and Indian Commerce Clauses. But when tribal preferences are untethered from tribal land or tribal self-government and simply provide a naked preference based on race, strict scrutiny is imperative.

When interpreted correctly, ICWA serves the legitimate purpose of preventing the involuntary removal of Indian children from their families and, in cases involving the custody of Indian children domiciled on tribal land, ensuring the Tribe's ability to exercise its sovereignty over the custody proceedings. *See Holyfield*, 490 U.S. at 30-37 (describing purposes of ICWA). But it is another thing entirely to employ race-based preferences in adoption proceedings where the child is in the exclusive custody of a non-Indian parent who, as the only legally recognized parent of the child, has chosen to place the child for adoption. Conferring special privileges on the biological father – or more to the point, special disabilities on a child – simply because of race serves no purpose relating to "Indian self-government," *Mancari*, 417 U.S. at 555; to the contrary, the child's home is already outside the Tribe, not because the non-Indian mother decided to place the child for adoption, but because the Indian father previously abandoned the child to the non-Indian mother. Surely the application of section 1912(f) under these circumstances is exactly the sort of race-based differential treatment this Court has long understood to violate the Equal Protection Clause. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (recognizing a strong presumption that custody determinations based on race are unconstitutional).

C. The South Carolina Supreme Court's Interpretation of ICWA Threatens Children's Fundamental Liberty Interests

The lower court's erroneous interpretation of ICWA also presents a serious threat to Baby Girl's fundamental liberty interests. The Guardian is legally responsible for ensuring the best interests of the child and in particular determining whether her interests are best served by continuing the intimate family relationship she has already enjoyed with the adoptive couple for the first 27 months of her life. While those issues are primarily matters of state law, the best interest determination also serves to protect the federal liberty interests of children in custody proceedings. This Court has long recognized that the maintenance of "certain intimate human relationships" must be "secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Foremost among these "intimate human relationships" is "the creation and sustenance of a family." *Id.* at 617-19. "Family relationships," this Court has observed, "involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* at 619-20. These relationships are accordingly granted "a substantial measure of sanctuary from unjustified interference by the State," *id.* at 618, in which a child, no less than a parent, may seek shelter. *See*

Reno v. Flores, 507 U.S. 292, 304 (1993); *cf. Plyler v. Doe*, 457 U.S. 202, 223 (1982).

There can be no dispute that the lower court's application of ICWA in this case resulted in respondent Baby Girl's removal from the only "intimate human relationships" she had ever known. Certainly there are some circumstances – such as in cases of abuse or neglect – where the government may, indeed should, interfere with a child's family relationships in order to protect her best interests. And where, as in *Holyfield*, a Tribe's sovereignty over its own citizens is at stake, such intrusion may be warranted by such distinctly federal interests. *See Holyfield*, 340 U.S. at 54 (explaining that because Congress had granted tribes exclusive jurisdiction over custody proceedings involving children domiciled on tribal lands, "[i]t is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe – and perhaps the children themselves – in having them raised as part of the Choctaw community"). But as a general matter, the best interests standard operates to protect the liberty interests of the minor child. Thus, any federal effort to override the traditional best interest standard risks implicating constitutional concerns. While the federal role is justified in cases like *Holyfield* where there is a clear connection between the child and tribal sovereignty and tribal land, in this case and many others like it, ICWA was applied to remove the child from the only family she had ever known for no reason other than her biological father's race. It bears repeating: Baby Girl was *already* disconnected from the Tribe and her

Indian relatives well before the adoption proceedings, by virtue of *Birth Father*'s decision to abandon her. Presumably, if Birth Mother had raised the child as a single parent, Birth Father would have had no basis to interfere based on his express abandonment of his parental rights. Allowing Birth Father nonetheless to rely on his Indian heritage as a basis for blocking Baby Girl's adoption is not only a perversion of ICWA, but an unwarranted and unconstitutional intrusion on the intimate family relationships Baby Girl developed as a result of Birth Father's intentional absence from her life.

The lower court's interpretation and application of ICWA also turned the purpose of the custody proceedings on its head, focusing exclusively on Birth Father's rights as an Indian, and rendering Baby Girl's best interests wholly irrelevant. *See* Pet. App. 54a-55a (Kittredge, J., dissenting) (criticizing "the majority's approach of applying ICWA in a rigid, formulaic manner without regard to the facts of the particular case and the best interests of the Indian child"). As this Court observed in *Holyfield*, "[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." 490 U.S. at 50 n.24 (internal quotation omitted). That is all well and good when the Indian child's "relationship to the tribe" is based on something more than race. When the child has a demonstrable connection to the Tribe and tribal land, ICWA is appropriately invoked to prevent the child's removal from their home and their Tribe. But when the child has no meaningful connection to the Tribe or tribal land – because of the biological father's express relinquishment of his

parental rights and responsibilities – then an irrebuttable presumption that the child's best interests lie in placing her with the father is simply not compatible with basic principles of equal protection and due process.

Indeed, one of the most remarkable and troubling aspects of the decision below is the majority's dismissal of Dr. Saylor's expert testimony establishing that transferring Baby Girl's custody to Birth Father "would, beyond a reasonable doubt, be 'very traumatic,' . . . 'taking away everything she had come to know and count on for her comfort and security and replac[ing] it with something that would be completely unfamiliar and strange to her . . . taking away what has been the very source and foundation of her security in her life." Pet. App. 75a (quoting Dr. Saylor). The majority did not question the accuracy of the testimony, but simply found the emotional harm to Baby Girl irrelevant under ICWA because it would arise from the severance of Baby Girl's relationship with her adoptive parents and not from any abuse or neglect by Birth Father. *Id.* at 31a-32a. But the very fact that there was a pre-existing relationship with the adoptive couple should have alerted the court to the reality that this is not a typical ICWA case and that an analysis solely focused on Birth Father would not suffice. The Guardian's inquiry into the best interests of the child could hardly ignore the relationship between Baby Girl and her adoptive parents because that was the only family relationship that Baby Girl had ever known. That relationship is central to the Guardian's inquiry and to Baby Girl's liberty interests. Properly understood, ICWA does not

render that central relationship utterly irrelevant, because section 1912(f) is focused on the removal of children from pre-existing Indian family relationships and custody. But to apply ICWA to this inapposite context and then insist that all ICWA cares about is the abusiveness of a father who has no relationship with the child is doubly erroneous. Congress could not have intended such a counterintuitive result. As applied by the lower court in a case like this, section 1912(f) accomplishes nothing but "human tragedy." *Id.* at 101 (Hearn, J., dissenting).

* * * *

Faced with similar circumstances, many courts have correctly found ICWA inapplicable, explaining that the statutory text and the legislative history make clear that Congress never intended the Act to be a mechanism for disrupting the lives of already vulnerable children who are not domiciled on tribal land and have never had any tribal connection beyond biology. A number of courts have read the Act to preserve its constitutionality and to prevent it from causing trauma and tragedy in cases having nothing to do with tribal sovereignty. In *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 516 (Cal. App. 2d 1996), for example, the Second District of the California Court of Appeals interpreted ICWA as a matter of constitutional avoidance. The court explained that "any application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least

predominantly, upon race and is subject to strict scrutiny under the equal protection clause," and that no compelling interest for the differential treatment exists where the biological parents lack any relationship to a tribal community. *Id.* at 1509. The court also noted that under these circumstances, the application of ICWA "can serve no purpose which is sufficiently compelling to overcome the child's fundamental right to remain in the home where he or she is loved and well cared-for, with people to whom the child is daily becoming more attached by bonds of affection and among whom the child feels secure to learn and grow." *Id.* at 1508; *see also In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 686 (Cal. App. 4th 1996) ("agree[ing] with *Bridget R.* that recognition of the existing Indian family doctrine is necessary to avoid serious constitutional flaws in the ICWA"); *In re Santos Y.*, 112 Cal. Reptr. 2d 692 (Cal. App. 2d. 2001).

* * * *

Finally, the Guardian believes this Court should grant the Petition because as rare as it is to see such a deep and widespread conflict among state courts over a question of federal law, it is equally rare to see a case of such deep and well-established family bonds utterly disregarded. This Court's primary concern is the proper interpretation of federal law. The Guardian's primary charge is to protect the best interests of Baby Girl. The decision below clearly implicates both interests. As explained above and in the Petition, the decision below deepens well-entrenched conflicts that only this Court can resolve. It also needlessly puts ICWA on a collision course

with the equal protection and due process rights of some of our country's most vulnerable children. State law entitles Baby Girl to a best interests determination that fully protects her liberty interest in maintaining the only family relationships she had ever enjoyed. As interpreted by the court below, Baby Girl's best interests and liberty interests are rendered utterly irrelevant, not by her unique connection to a Tribe or tribal land, but because of Birth Father's race. Both jurisprudential interests and the child's best interests clearly favor this Court's plenary review.

This case presents these important federal questions as cleanly and dramatically as any case will. The South Carolina Supreme Court expressly acknowledged that the statutory interpretation questions presented by petitioners are outcome determinative in this case: if ICWA does not apply, then Birth Father's abandonment of Baby Girl before the adoption proceedings extinguishes his standing to contest the adoption, and Baby Girl will be returned to and adopted by petitioners. Pet. App. 21a n.19, 24a. The Guardian urges this Court to grant the petition and to provide Baby Girl and the thousands of other children caught in the middle of this statutory mess with the clarity and certainty they deserve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 12-399

In the
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF FOR GUARDIAN AD LITEM, AS REPRESENTATIVE OF RESPONDENT BABY GIRL, SUPPORTING REVERSAL

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February 19, 2013

QUESTIONS PRESENTED

(1) Whether a non-custodial parent can invoke the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-63, to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

(2) Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

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INTRODUCTION

The Guardian ad Litem is the duly appointed representative of the respondent child ("Baby Girl") in these proceedings, with standing to file this brief on Baby Girl's behalf. Baby Girl was born on September 15, 2009, to an impoverished single mother ("Birth Mother") who had two other children and felt she could not adequately care for a third child on her own. Although Birth Mother was engaged to the biological father ("Birth Father") at the time of Baby Girl's conception, he refused to assist Birth Mother with her pregnancy-related costs, and when the relationship ended six months into the pregnancy, he told Birth Mother that he wanted to relinquish his parental rights rather than support her or the child.

After hearing that news, Birth Mother contacted an adoption agency, carefully investigated potential adoptive parents, and chose Adoptive Couple to raise Baby Girl. Adoptive Couple immediately took on an active role supporting Birth Mother and preparing for the birth of Baby Girl. They were there in the delivery room and took Baby Girl home from the hospital.

Having made no efforts to inquire about Baby Girl's well-being or whereabouts, Birth Father first learned of Baby Girl's adoptive placement when, four months after Baby Girl's birth, he received and signed legal papers consenting to the adoption. Birth Father later stated that he thought he was consenting to the termination of his parental rights and did not realize until later that Baby Girl was in the custody of Adoptive Couple and would be adopted

by them rather than raised by Birth Mother on her own. At that point, Birth Father decided to attempt to block the adoption and obtain custody of Baby Girl.

It is indisputable that under state law and this Court's long line of precedent addressing the parental rights of unwed biological fathers, Birth Father's failure to support the pregnancy or show an interest in Baby Girl in the months after her birth deprived him of any legal standing to intervene in the adoption proceedings and disrupt the familial bonds that formed between Baby Girl and Adoptive Couple during Birth Father's intentional absence. In the eyes of South Carolina law and the U.S. Constitution, the window for Birth Father to establish a legally recognized child-parent relationship with Baby Girl had closed. The combination of state law and this Court's precedents effectively guaranteed that the best interests of Baby Girl would be protected.

The lower courts acknowledged all of this, but nonetheless held that because Birth Father is a member of the Cherokee Nation, he could block the adoption and obtain custody under the Indian Child Welfare Act ("ICWA"). The effect on Baby Girl and her rights was profound indeed. Under state law, Baby Girl was entitled to have her individual best interests be "the primary, paramount and controlling consideration of the court" in determining whether her adoption should be approved. *Cook v. Cobb*, 271 S.C. 136, 140 (1978). Under the lower courts' interpretation of ICWA, her best interests were not the focus—indeed they were not directly relevant at all. If ICWA applied, the only question was whether "the continued custody of the child by the parent ... is

likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). In short, the question was no longer which placement would be in Baby Girl's best interests, but whether Birth Father would "serious[ly]" harm Baby Girl. Finding no such evidence, the trial court denied the adoption petition and ordered custody of Baby Girl transferred to Birth Father.

On December 31, 2011, Baby Girl, then 27 months old, was removed from the only home she had ever known—a home handpicked by Birth Mother in her capacity as Baby Girl's sole legal and physical custodian—and handed over to Birth Father, whom she had never met.

This "human tragedy" was neither mandated by ICWA nor permitted by the Constitution. Pet.App.101a. ICWA does not confer rights on biological fathers who have no legally recognized parental relationship with the child in the first place, nor does it operate to block the adoption of a child who was never domiciled on a reservation and who was never in the legal or physical custody of an Indian parent due to the Indian biological parent's express abandonment of the child in utero. These limitations on ICWA's scope are not only consistent with congressional intent, but necessary to preserve the Act's constitutionality, ensuring that the Act functions only to promote tribal sovereignty and the unique interests of Indians as tribal citizens, and not as invidious racial discrimination.

The facts of this case make this clear. Baby Girl is a predominantly Hispanic child with a 3/256th quantum of Cherokee blood she inherited from a

biological father who abandoned her before birth to the sole legal and physical custody of her non-Indian birth mother. Baby Girl was never domiciled on a reservation and had no other tribal connection. The Cherokee Nation is certainly free to deem Baby Girl eligible for tribal membership, but a sliver of genetic material absent any connection to tribal land or sovereignty cannot be enough to deprive her of her most basic rights. The effect of the federal statute, applicable only because of that genetic material, was Copernican. Instead of the legal inquiry revolving around Baby Girl and her best interests, it focused only on Birth Father and his potential to seriously harm her. The lower court's decision countenancing that result is not only a perversion of ICWA, but a violation of Baby Girl's most basic constitutional rights to equal protection and due process under the law.

STATEMENT OF THE CASE

A. State Paternity And Custody Law

The extent to which a man is legally recognized as a child's father is and always has been a function of state law. *See De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (the child-parent relationship is "a legal status" which "requires a reference to the law of the State which create[s] those legal relationships"). Before the 1980s, no accurate method existed for establishing biological parenthood, and accordingly, state paternity law historically focused on non-scientific indicators of a father-child relationship,

primarily marriage to the birth mother.[1] Consistent with this historical understanding of paternity, up until the 1970s, state law generally treated children born out of wedlock as exclusively within the legal custody of the natural mother even when paternity was uncontested. In many states, the natural mother's status as exclusive legal custodian included sole decision-making authority over whether to place the child for adoption.[2]

In 1972, this Court issued its decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), the first in a series of cases identifying circumstances in which unwed fathers have a constitutionally protected interest in participating in their children's custody proceedings. *See Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v.*

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[1] *See* Karen A. Hauser, *Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to the Need for Change*, 65 U. Cin. L. Rev. 891, 947 (1997) ("Prior to 1977, the ABO blood grouping test, when used alone, was capable of proving a false allegation of paternity about twenty to twenty-five percent of the time."); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. Rev. 637, 644 (1993) ("During most of the last century, ... biology was more often secondary [in determining paternity]. Unwed biological fathers had no right to commence paternity actions under the common law. Moreover, the common law established an irrebuttable presumption that a mother's husband was the father of her children.").

[2] *See* Karen C. Wehner, Comment, *Daddy Wants Rights Too: A Perspective on Adoption Statutes*, 31 Hous. L. Rev. 691, 693 (1994); Scott Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 Seton Hall Legis. J. 363, 390 (1996).

Mohammed, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978). These cases collectively hold that an unwed natural father has constitutionally recognized parental rights if, and only if, he makes a timely, affirmative effort to establish a parental relationship with the child. As the Court summarized in *Lehr*, 463 U.S. at 261-62: "[T]he mere existence of a biological link does not merit equivalent constitutional protection. ... The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie."

In the wake of *Stanley* and its progeny, state legislatures adjusted their paternity and custody laws to reflect the line drawn by this Court: an unwed father enjoys legally recognized parental rights, including the right to object to the child's adoption by another family, if and only if he timely "grasps that opportunity" to support and care for his child. *See, e.g.*, Ala. Code §§ 26-10A-9(a)(1), (3); Del. Code tit. 13 § 1103(a)(2); Fla. Stat. § 63.062(2)(a)(1); Haw. Rev. Stat. § 578-2(a)(5); Idaho Code § 16-1504(2); Kan. Stat. § 59-2136(h)(1); Miss. Code §§ 93-17-6(4), (5); Mont. Code Ann. §§ 42-2-610(1), (3); N.C. Gen. Stat. § 48-3-601(2)(b); Ohio Rev. Code § 3107.07(B); Okla. Stat. tit. 10, § 7505-4.2(C); S.C.

Code §§ 63-7-2570(3), (4); S.D. Codified Laws §§ 25-6-4(2), (3), (4).

Consistent with this Court's precedent, South Carolina has established "general minimum standards by which an unwed father timely may demonstrate his commitment to the child, and his desire ... to assume full responsibility for his child." *Abernathy v. Baby Boy*, 313 S.C. 27, 29 (1993). In adoptions involving a child who was placed with the prospective adoptive parents more than six months after the child's birth, South Carolina recognizes an unwed father as a parent with standing to object only if he "has maintained substantial and continuous or repeated contact with the child," as demonstrated by financial support and regular communication with the child. S.C. Code § 63-9-310(A)(4). Where, as in the present case, the child was placed with the prospective adoptive parents within six months of the child's birth, the standing inquiry focuses on the birth father's actions during the pregnancy and shortly after the child's birth, requiring that:

> (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
>
> (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child,

> including, but not limited to, medical, hospital, and nursing expenses.

Id. § 63-9-310(A)(5).

Similar to the requirements of many other states, these provisions reflect the State's recognition of the paramount interest of young children in forming immediate and stable family attachments. Accordingly, the window for a birth father to step forward to care for his child is strictly limited—if in the birth father's absence, the child is placed with an adoptive family, even the birth father who sincerely changes his mind will not be allowed to disrupt the adoption.

Applying this standard, the South Carolina Supreme Court has refused to allow birth fathers to intervene in adoption proceedings if they failed to make meaningful efforts to support the birth mother or child before the initiation of the proceedings. In *Roe v. Reeves*, 392 S.C. 143 (2011), for example, the birth father had during the first trimester of the birth mother's pregnancy told the birth mother that he did not want to support the child, but then changed his mind when the birth mother was six months pregnant. *Id.* at 145-48. Although he purchased some diapers for the child and clothes for the birth mother during the last few months of the pregnancy and lodged his objection to adoptive placement immediately after the child was born, the South Carolina Supreme Court found these efforts inadequate under the state law, explaining: "The record does not support the conclusion that Father undertook a sufficient effort to make the sacrifices fatherhood demands. ... The fact that he now wishes

to raise his son does not overcome his lack of support and contribution while Mother was carrying his child or after he was born. In short, he did not fully 'grasp [the] opportunity' to come forward and demonstrate a full commitment to the responsibilities of parenthood through prompt and good faith efforts." *Id.* at 155.

All fifty states have recognized the best interests of the child as the cornerstone for resolving custody disputes.[3] South Carolina in particular requires that "[t]he welfare of the child and what is in his/her best interest" be "the primary, paramount and controlling consideration of the court." *Cook*, 271 S.C. at 140; *see also Adams v. Miller*, 253 S.C. 118 (1969); S.C. Code § 63-9-1310 (declaring that the purpose of South Carolina adoption law is "to achieve the objective of the best interests of the child"). In determining the best interests of the child, South Carolina courts "consider the character, fitness, attitude, and inclinations on the part of each parent as they impact the child." *Woodall v. Woodall*, 322 S.C. 7, 11 (1996). "In addition, psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life should be considered." *Id.*

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[3] *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & Fam. Stud. 337, 370 (2008) ("Today, every state has a statue requiring that the child's best interests be considered whenever decisions regarding a child's placement are made.").

B. The Indian Child Welfare Act

Congress enacted the Indian Child Welfare Act of 1978 ("ICWA") to address concerns about "an alarmingly high percentage of Indian families" being "broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901. The Act has three primary purposes.

First, the Act seeks to preserve tribal sovereignty by providing tribes with sole jurisdiction over custody proceedings involving Indian children domiciled on tribal land, *see id.* § 1911(a), and concurrent jurisdiction with state courts over custody proceedings involving Indian children who are not domiciled on tribal land, *see id.* § 1911(b); *see also Miss. Band of Choctow Indians v. Holyfield*, 490 U.S. 30, 36 (1989) (describing these provisions as "the heart of the ICWA"). In the latter category of cases, a state court custody proceeding shall upon petition by either parent or the child's tribe be transferred to tribal court unless one of the parents objects, the tribe declines transfer, or there is "good cause to the contrary." 25 U.S.C. § 1911(b). In *Holyfield*, this Court adjudicated a dispute over the meaning of domicile for the purposes of these provisions and concluded that an Indian child's domicile is determined pursuant to federal common law rather than state law. *Holyfield*, 490 U.S. at 49-53. It is uncontested in this case that neither Birth Father nor Baby Girl has ever been domiciled on tribal land and that the adoption proceedings were properly in South Carolina state court. Pet.App.15a n.16.

Second, the Act provides federal funding to establish and operate Indian child and family service programs on or near reservations. *See* 25 U.S.C. §§ 1931-33.

Third, the Act "establish[es] ... minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." *Id.* § 1902. These federal standards focus primarily on establishing the rights of Indian parents and tribes in state custody proceedings. The Act defines "Indian child" as any unmarried minor who either is a member of an Indian tribe or "is the biological child of a member of an Indian tribe" and eligible for membership. *Id.* § 1903(4). The Act defines "parent" as "any biological parent or parents of an Indian child," but specifically excludes "the unwed father where paternity has not been acknowledged or established." *Id.* § 1903(9). The Act does not set forth any procedures for determining whether an unwed father's paternity has been "acknowledged or established." The House Report accompanying the Act notes, however, that this definition of "parent" "is not meant to conflict with the decision of the Supreme Court in *Stanley*." H.R. Rep. No. 95-1386, at 21 (1978), 1978 U.S.C.C.A.N. 7530, 7543.

Indian tribes and parents as defined by the Act may intervene in the state custody proceedings at any point, 25 U.S.C. § 1911(c); have rights to notification of the proceedings and the right to intervene, with 10 days' notice of any proceeding to terminate parental rights or place the child in foster care, *id.* § 1912(a); and a right to court-appointed

counsel in any removal, placement, or termination proceeding, *id.* § 1912(b). In addition, in a voluntary proceeding for termination of parental rights or adoptive placement of an Indian child, the parent's consent "may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, at which point "the child shall be returned to the parent." *Id.* § 1913(c). And in involuntary proceedings, the party seeking termination of parental rights "shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." *Id.* § 1912(d). Furthermore, "[n]o termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(f).

Finally, in "any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." *Id.* § 1915(a).

C. The Role Of The Guardian Ad Litem

Like many states, South Carolina provides for the appointment of a guardian ad litem to "represent[] the best interest of the child" in contested custody proceedings. S.C. Code § 63-3-

830(A)(1); *see also* Pet.App.10a-11a (explaining that the Guardian was appointed pursuant to state law "to represent[] the interests of Baby Girl" in these proceedings). The guardian may be either an attorney or layperson, but must meet specified training requirements. S.C. Code § 63-3-820. The guardian is appointed to a case by court order. *Id.* § 63-3-810(B). All parties must consent to the appointment of a guardian ad litem, but the trial court has "absolute discretion in determining who will be appointed." *Id.* §§ 63-3-810(A)(2), (B).

The guardian is responsible for "conducting an independent, balanced, and impartial investigation to determine the facts relevant to the situation of the child," including reviewing all relevant records, meeting with and observing the child, visiting the home settings, interviewing parents and caregivers, and considering the wishes of the child. S.C. Code § 63-3-830(A)(2). Based on this investigation, the guardian provides the court with "a final written report regarding the child's best interest." *Id.* § 63-3-830(A)(6); *see* 21 S.C. Jur. Children & Families § 132 (2012) ("The recommendation of an experienced, informed, and unbiased guardian ad litem will be difficult to overcome."). The guardian then participates in the proceedings as the representative of the child, with authorization to "submit briefs, memoranda, affidavits, or other documents on behalf of the child." S.C. Code § 63-3-830(B); *see also* 21 S.C. Jur. Children & Families § 123 (2012) (explaining that in custody matters, the guardian's responsibilities include "presenting the evidence and witnesses in court, and engaging in vigorous advocacy").

The guardian in this case ("the Guardian") maintains an ongoing responsibility to serve as Baby Girl's representative until the family court modifies or terminates the appointment. *See* S.C. Code § 63-3-870; Sup. Ct. R. 12.6 ("All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court."). The Guardian's representation of Baby Girl as a respondent in the proceedings before this Court is also authorized under Fed. R. Civ. P. 17(c)(2) ("A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action."). Indeed, this Court is quite familiar with the role of the guardian ad litem in pressing legal arguments, including constitutional arguments, on behalf of a child in a custody dispute. *See, e.g., Michael H.*, 491 U.S. 110 (adjudicating the guardian ad litem's argument that the decision below violated the child's due process, equal protection, and fundamental liberty interests).

D. Factual Background

Birth Mother became pregnant with Baby Girl in January 2009. At the time, she was engaged to Birth Father but they did not live together; she resided in Bartlesville, Oklahoma and he was stationed in Fort Sill, Oklahoma, approximately four hours away. Pet.App.43-a44a. Birth Father acknowledged from the outset that the child was his, but refused Birth Mother's request for financial support on the ground

that he did not believe he was "responsible as a father" unless he and Birth Mother were married. Pet.App.44a-45a. By April 2009, the relationship had deteriorated and in May 2009, Birth Mother ended the engagement. Pet.App.2a-3a. The next month, she sent him a text message asking whether he would pay child support or instead preferred to terminate his parental rights. Birth Father sent a return text message stating that he surrendered his parental rights. Pet.App.4a; R.543 ("Q. And, in fact, in June you messaged [Birth Mother] that you wanted to sign your rights away; is that correct? A: That is correct, sir."). He later testified that he chose to relinquish his parental rights over paying child support in an effort to "give [Birth Mother] time to think about" whether she should have ended their relationship. Pet.App.4a.

Impoverished and unable to afford to raise Baby Girl by herself, Birth Mother decided to pursue adoption. Pet.App.4a. Birth Mother testified that she "wanted [her] little girl to have a chance" and that she believed adoption would be in Baby Girl's best interests. Pet.App.46a. "Birth Mother took very seriously her responsibility—first to care for her unborn child, and then to secure for her a loving, stable home." Birth Mother Cert. Amicus Br. 7.

Under Oklahoma law, Birth Mother had no obligation to inform Birth Father of the adoption plans, and consistent with his express relinquishment of his parental rights, she declined to do so. Okla. Stat. tit. 10, §§ 7503-3.1, 7505; Pet.App.46a. Indeed, under Oklahoma law, Birth Father's refusal to assist with pregnancy-related

expenses and his express abdication of his parental responsibilities deprived him of any legal interest in Baby Girl's adoption process. Okla. Stat. tit. 10, §§ 7501-7505.

In June 2009, Birth Mother was introduced to Adoptive Couple through an adoption agency. Pet.App.46a. Adoptive Couple married in December 2005 and reside in Charleston, South Carolina, where Adoptive Mother works as a psychologist focusing on child development and Adoptive Father works at Boeing as an automotive body technician. Pet.App.5a. The couple had desired children for many years but struggled with infertility and ultimately decided to adopt. Pet.App.46a. Birth Mother testified that she considered families in Oklahoma, but chose Adoptive Couple to raise Baby Girl because she believed they shared her values and would provide Baby Girl a stable and loving home "where she can look up to them and they can give her everything she needs when needed." Pet.App.5a, 47a. Birth Mother also appreciated that Adoptive Couple were interested in Birth Mother continuing to have a relationship with them and Baby Girl via an open adoption. R.400-01.

During the last trimester of Birth Mother's pregnancy, she spoke to Adoptive Couple on the phone weekly, and in August 2009, they traveled to Oklahoma to visit her. Pet.App.5a, 47a. Adoptive Couple also provided financial assistance to support Birth Mother in the final months of her pregnancy and shortly after Baby Girl's birth. Pet.App.5a. When Birth Mother gave birth to Baby Girl on September 15, 2009, Adoptive Couple were in the

delivery room and Adoptive Father cut the umbilical cord. Pet.App.7a.

In the adoption papers Birth Mother completed before Baby Girl's birth, Birth Mother identified Birth Father as the biological father and noted that he had Cherokee heritage. Pet.App.5a-6a. Birth Mother also provided her attorney with Birth Father's name, his location at the army base in Fort Sill, and what she believed to be Birth Father's date of birth. Pet.App.6a, 47a. Although neither Adoptive Couple nor Birth Mother had any legal obligation to contact Birth Father or the Cherokee Nation ("the Tribe") at that time, *see* 25 U.S.C. § 1912(a); Okla. Stat. tit. 10, § 40.4, Birth Mother's attorney forwarded the information to the Tribe in a letter explaining that Birth Mother believed Birth Father to have some Cherokee heritage, and asking whether the Tribe would consider Baby Girl to be an "Indian Child" under ICWA. J.A.5-6. The letter further explained that the reason for the inquiry was that Birth Mother had chosen a non-Indian couple to adopt Baby Girl and wanted to know whether the Tribe would object. J.A.5-6.

The Tribe responded that it could not verify Birth Father's membership based on the information provided, and therefore Baby Girl was not an "Indian Child," but that "[a]ny incorrect or omitted family documentation could invalidate this determination." J.A.8. The Tribe later stated that the reason it could not verify Birth Father's membership is that the date of birth was incorrect (the letter identified the right month but not year) and that the letter misspelled Birth Father's first name as "Dustin" rather than

"Dusten."[4] Pet.App.6a, 47a. The day after Baby Girl's birth, Birth Mother signed forms relinquishing her parental rights and consenting to Baby Girl's adoption by Adoptive Couple. Pet.App.7a. Neither ICWA nor state law required notice of the adoptive placement to Birth Father or the Tribe. *See* 25 U.S.C. § 1912(a); S.C. Code § 63-9-730; Okla. Stat. tit. 10, § 40.4.

In the paperwork, Birth Mother affirmatively listed "Caucasian/Native American Indian/Hispanic" as Baby Girl's ethnicity, with "Hispanic" circled. J.A.29. Birth Mother testified that she did not circle Hispanic and did not know who had. R.388-89. In any event, whatever the provenance of the circle, Baby Girl is indeed predominantly Hispanic with some Native American and Caucasian background: Birth Mother is primarily Hispanic,[5] while Birth Father is 3/128th Cherokee, making Baby Girl 3/256th Cherokee.[6] Adoptive Couple initiated

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[4] The record indicates that Birth Father is inconsistent in spelling his name. J.A.70-76 (child support checks submitted by Birth Father during adoption proceedings spelling his name "Dustin," "Dustan," and "Dusten").

[5] Birth Mother testified that one of her great, great grandmothers may have been Cherokee, but the Tribe does not recognize Birth Mother as having any Cherokee lineage. R.390, 404.

[6] During the Guardian's investigation, Birth Father and his parents submitted a letter to the Guardian stating that Baby Girl is 3/256th Cherokee. The Guardian was also given a copy of paternal grandfather's tribal membership card stating he is 3/64th Cherokee. The Guardian will lodge these documents with the Court at the Court's request.

adoption proceedings in South Carolina three days after Baby Girl's birth, and the next week returned to South Carolina with Baby Girl. Pet.App.7a, 49a.

At no point during the pregnancy or in the months surrounding Baby Girl's birth did Birth Father provide or offer to provide any financial support to assist with Birth Mother's pregnancy-related expenses, even though he acknowledged he had the financial resources to do so. Pet.App.4a, 44a-45a & n.34. And although Birth Father knew that Baby Girl's expected due date was the first week of September, he did not make any effort to inquire about Baby Girl's well-being or whereabouts in the months following her birth. Pet.App.48a; R.513, 546-47. Birth Father also declined to inform the Cherokee Nation of Baby Girl's birth. R.551.

On January 6, 2010—approximately four months after Baby Girl's birth and seven months after Birth Father's last communication with Birth Mother expressing his intent to relinquish his parental rights—a process server presented Birth Father with legal papers stating he was not contesting the adoption of Baby Girl. Pet.App.8a-9a. Birth Father signed, later testifying that he believed the papers terminated his parental rights but that Birth Mother would still have custody of the child:

> Q: But you were prepared to sign all your rights and responsibilities away to this child just so as long as the mother was taking care of the child?
>
> A: That's correct.

> Q: And you would not be responsible in any way for the child support or anything else as far as the child's concerned?
>
> A: Correct.

Pet.App.46a.

E. Proceedings Below

Five days after signing the adoption consent papers, Birth Father requested a stay of the South Carolina adoption proceedings, and soon after filed a complaint in Oklahoma state court seeking custody of Baby Girl. Pet.App.50a. Birth Father's complaint included the following statement: "Neither parent nor the children [sic] have [sic] Native American blood. Therefore the Federal Indian Child Welfare Act ... do[es] not apply." Pet.App.9a; R.708. The Complaint includes a signed, notarized statement by Birth Father that each of the statements set forth in the Complaint "are true and correct except those matters stated on information and belief and those he believes to be true." R.709.[7] Nonetheless, on March 30, 2010, the Cherokee Nation intervened in the action based on Birth Father's registration with the Tribe. J.A.40-43. The Tribe's intervention motion was the first notice that Birth Mother and Adoptive Couple received regarding Birth Father's tribal membership; at that point, Baby Girl was six

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[7] When asked to explain why he included a false sworn statement in the Complaint declaring himself not Indian, Birth Father responded that he was about to deploy and "was trying to get things taken care of as fast as possible." R.550.

and half months old and had lived with Adoptive Couple her entire life. The next day, Adoptive Couple amended their complaint in the South Carolina proceedings to acknowledge Birth Father's Indian status. J.A.44-49.

On April 19, 2010, Birth Father amended the complaint to allege that both he and Baby Girl have Native American blood and therefore ICWA does apply. Pet.App.50a. Because South Carolina was Baby Girl's home state, the complaint was dismissed on jurisdictional grounds, but Birth Father and the Tribe successfully moved to intervene in the South Carolina adoption proceedings. Pet.App.10a, 50a.

Like Oklahoma law, South Carolina law provides that Birth Father's actions during Birth Mother's pregnancy and in the four months following Baby Girl's birth—in particular his refusal to provide any financial support to Birth Mother and Baby Girl—dissolved any legal parent-child relationship that would have rendered his consent necessary to Baby Girl's adoption by Adoptive Couple. Pet.App.21a-22a; S.C. Code § 63-9-310(A)(5). Birth Father argued, however, that as a member of the Cherokee Nation, he could invoke ICWA to block the adoption. Pet.App.10a n.12.

Pursuant to South Carolina law, the trial court appointed the Guardian to "represent[] the interests of Baby Girl" in the proceedings. Pet.App.10a-11a. The Guardian then undertook an investigation to determine the best interests of Baby Girl. In addition to reviewing numerous home studies and reports, the Guardian interviewed Adoptive Couple at their home in South Carolina and observed their

interactions with Baby Girl. The Guardian also traveled to Oklahoma to meet and interview Birth Father, as well as his parents and a daughter from a previous relationship. Pet.App.71a.

Based on this investigation, the Guardian concluded that it was in the best interests of Baby Girl to remain in the care and custody of Adoptive Couple. Pet.App.51a. She found that Baby Girl was a well-adjusted and emotionally secure child with the benefit of two loving adoptive parents. Pet.App.71a. In contrast, the Guardian expressed concerns about Birth Father's interest in establishing paternity, explaining that she found no evidence that Birth Father had been prevented from establishing his parental rights before Baby Girl's birth, or that he had attempted to be present at the child's birth or even inquired about the child or Birth Mother's health thereafter. Pet.App.71a-72a. The Guardian also found no evidence that Birth Father made reasonable efforts to provide financial support to Birth Mother or Baby Girl, or that he had developed a parenting plan that would enable him to provide for Baby Girl himself, rather than relying on his parents. Pet.App.71a-72a. Applying the traditional state-law criteria for protecting the best interests of the child, the Guardian concluded that they clearly favored leaving Baby Girl in the custody of her adoptive parents.[8]

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[8] Under S.C. Code § 63-3-830(A)(6), a guardian ad litem's report "may contain conclusions based upon the facts contained in the report" but may not make "a recommendation concerning which party should be awarded custody." Upon objection by Birth

By the time the adoption proceeding was tried in September 2011, Baby Girl was two years old and had lived with Adoptive Couple her entire life. Pet.App.10a. The Guardian testified that it was her factual finding that Baby Girl's well-being would be best served by approval of the adoption. Pet.App.51a. Birth Mother also urged the court to finalize the adoption. Pet.App.46a.

On November 25, 2011, the trial court denied the adoption petition and ordered custody of Baby Girl transferred to Birth Father. Pet.App.2a. The court acknowledged that under South Carolina law, Birth Father's abandonment of Baby Girl in utero extinguished any legal status he otherwise would have had to contest the adoption, but held that because Birth Father is Indian, he could invoke ICWA's parental termination provision to block the adoption. Pet.App.11a; 25 U.S.C. § 1912(f). The court thus ordered Adoptive Couple to surrender Baby Girl to Birth Father. Adoptive Couple and the Guardian separately moved for reconsideration, but the motions were denied. Pet.App.11a n.13.

On December 31, 2011, Adoptive Couple handed over Baby Girl, then 27 months old, to Birth Father, whom Baby Girl had never met. Pet.App.11a. It is the Guardian's understanding that Birth Father allowed Baby Girl to speak with Adoptive Couple by

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Father and the Tribe, the parties agreed that the trial court would not consider any portion of the report that constituted a "recommendation" rather than a conclusion. Pet.App.51a n.44; R.623.

telephone the following day, and then cut off all communication between them.

A fractured South Carolina Supreme Court upheld the transfer of Baby Girl's custody.[9] The majority recognized, like the trial court, that under South Carolina law, Birth Father's failure to timely support Birth Mother and Baby Girl dissolved any legal parent-child relationship that would have given him standing to contest the adoption. Pet.App.21a-22a n.19 ("Under state law, Father's consent to the adoption would not have been required."). The court agreed with the trial court, however, that Birth Father nonetheless was entitled to block the adoption under ICWA.

The court rejected Adoptive Couple's argument that Birth Father could not invoke ICWA because he does not qualify as a "parent" under the Act, which excludes from its definition of parent any "unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9); Pet.App.20a-22a. Adoptive Couple argued that because Birth Father's paternity was not "acknowledged or established" as a legal matter—i.e., because Birth Father was not a

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[9] The Guardian initially filed a brief in the South Carolina Court urging reversal of the trial court's decision to apply ICWA to the custody proceedings. She subsequently withdrew her brief after deciding that Baby Girl would be better served if the South Carolina Supreme Court were only asked to address the arguments raised by petitioners in their appeal. The Guardian's withdrawal of her brief did not have any effect on Baby Girl's status as a party in the case or the Guardian's continuing representation of Baby Girl. *See supra* p.14.

legally recognized parent of Baby Girl with standing to participate in the adoption proceedings—he did not fall within the category of Indian parents whose parental rights receive enhanced protection under ICWA. Pet.App.20a-22a.

The court disagreed, holding that although the Act "does not explicitly set forth a procedure for an unwed father to acknowledge or establish paternity," Birth Father met the Act's definition of "parent" because he had "acknowledg[ed] his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establish[ed] his paternity through DNA testing." Pet.App.21a-22a.

Having found Birth Father to be a "parent" under ICWA, the majority held that Birth Father's "lack of interest in or support for Baby Girl during the pregnancy and first four months of her life ... [was] not a valid consideration" in the adoption proceedings. Pet.App.32a n.26. The majority explained that under ICWA, Indian "parents" are free to withdraw their voluntary relinquishment of parental rights for any reason at any time prior to the entry of a final decree of termination or adoption, and upon withdrawal of consent, "the child shall be returned to the parent." 25 U.S.C. § 1913(c); Pet.App.24a. And under ICWA, an Indian parent's rights may not be involuntarily terminated unless: (1) "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and ... these efforts have proved unsuccessful, 25 U.S.C. § 1912(d); and (2) there has been "a

determination supported by evidence beyond a reasonable doubt ... that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," *id.* § 1912(f).

Here, the majority found, no efforts had been made to "prevent the breakup of the Indian family," Pet.App.26a, and Adoptive Parents did not "satisf[y] their burden of proving that Father's custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt," Pet.App.29a. The majority also asserted that even if Birth Father's rights were terminated, Birth Mother—a non-Indian single mother who had been told by the Cherokee Nation that the biological father who had abandoned their child also was not Indian—had violated section 1915(a) of the Act by placing Baby Girl with a non-Indian family. Pet.App.37a-39a; 25 U.S.C. § 1915(a).

The majority did not address, let alone dispute, the Guardian's findings that Baby Girl's interests would be best served through adoption by petitioners. Instead, the majority explained that "ICWA presumes that placement within its ambit is in the Indian child's best interests." Pet.App.39a.

Two of the five justices dissented. The dissenting justices criticized the majority for "decid[ing] the fate of a child without regard to *her* best interests and welfare," explaining that Congress did not intend ICWA "to be applied in derogation of the child's best interests," but instead "envisioned a symbiotic relationship between the additional protections of the Act and well-established state law

principles for deciding custody matters in accordance with the best interests of the child." Pet.App.41a. The dissenting justices accused the majority of "creating the illusion that Father's interests are in harmony with the best interests of the child," when "[t]he reality is Father purposely abandoned this child" and Birth Father's "vanishing act triggered the adoption in the first instance." Pet.App.42a. "Given the totality of the evidence," the dissenting justices observed, "placement with Father is not in Baby Girl's best interests. Father's established abandonment of parental responsibilities signifies 'that he is consciously indifferent to the rights—and emotional needs—of his infant daughter.'" Pet.App.72a (quoting *Doe v. Roe*, 386 S.C.624, 633 (2010)).

The dissenting justices also noted the testimony of Dr. Bart Saylor, a qualified expert in familial bonding, who explained that "severing the bond Baby Girl has formed with [the adoptive parents] would, beyond a reasonable doubt, be 'very traumatic,' ... 'taking away everything that she had come to know and count on for her comfort and security and replac[ing] it with something that would be completely unfamiliar and strange to her ... taking away what has been the very source and foundation of her security in her life." Pet.App.75a (quoting Dr. Saylor).

Finally, the dissenting justices rejected the notion that finalizing the adoption would result in the "breakup of [an] Indian family," explaining that "at the time Baby Girl was placed with Appellants, there was no indication Father had any interest in

grasping his opportunity as a parent. To the contrary, every indication from Father was that he was totally uninterested regarding Baby Girl's future and well-being and that he wished to 'give up' his parental rights." Pet.App.94a-95a. Accordingly, the dissenting justices concluded, "[t]he breakup of the Indian family does not turn on whether Baby Girl is raised by her mother or by Appellants—rather, the breakup of Father's Indian family was occasioned by Father's unwillingness to become involved in the child's life, a decision he made long before he learned of the adoption proceedings." Pet.App.91a.

SUMMARY OF ARGUMENT

"[T]he mere existence of a biological link" has never been the touchstone of parenthood or familial relationships. *Lehr*, 463 U.S. at 261. Just as this Court has long distinguished between the contribution of genetic material and the acts of caring for a child and forming a family, so too did Congress when it enacted ICWA. In interpreting the Act to prohibit the finalization of Baby Girl's adoption and require the transfer of custody to Birth Father without regard to Baby Girl's interests, the lower court misinterpreted the Act and needlessly put it on a collision course with Baby Girl's most basic constitutional rights.

As a threshold matter, the lower court erred in treating Birth Father as an Indian "parent" entitled to invoke ICWA. The Act's definition of "parent" specifically excludes any unwed biological father whose paternity is not "acknowledged or established." The lower court recognized that the Act does not set forth a procedure for acknowledging or establishing

paternity, but concluded that Birth Father "acknowledged" his paternity by intervening in the adoption proceedings and "established" his paternity through DNA testing. In so holding, the lower court ignored a much more logical reading of the statute that would explain Congress' decision to use the phrase "acknowledged or established" unelaborated and undefined: ICWA meant to incorporate state or tribal law as to when unwed father's paternity is acknowledged or established. Congress certainly could not have intended that the requirement be satisfied by DNA testing that did not even exist in 1978. Because Birth Father failed to satisfy South Carolina's definition of a "parent" with standing to participate in Baby Girl's adoption proceedings, he also failed to satisfy ICWA's definition of "parent" and should not have been allowed to invoke the Act to block Baby Girl's adoption.

Moreover, even aside from its mistake in treating Birth Father as an Indian "parent," the lower court's application of ICWA must be reversed because it relied on provisions that by their own terms demonstrate that ICWA has no application to this case. Throughout ICWA, Congress included language triggered only by previous legal or physical custody by the Indian parent, or at least some sort of state action preventing the Indian parent from obtaining legal or physical custody of the child. Neither the text nor purpose of the Act allow a biological parent who abandoned a child at birth to later exploit the Act to take the child from the family that raised her in the biological parent's absence.

These limitations on ICWA's scope are not only compelled by the statutory text and congressional intent, but also necessary to preserve the Act's constitutionality, ensuring that its differential treatment of Indians operates only to promote tribal sovereignty and the unique interests of Indians as tribal citizens, and not as invidious racial discrimination. In custody proceedings involving children domiciled on a reservation or who have some other non-biological tribal connection, the application of ICWA arguably serves these legitimate purposes. Moreover, in those settings, ICWA can be understood to classify on the basis of the Tribe's unique political and sovereign status under the Constitution and not trigger heightened scrutiny. But where the statute is triggered by nothing more than a child's 3/256th of Native American blood, where neither the child nor the biological parents are domiciled on Indian land or have any other close connection to tribal land or tribal sovereignty, its classifications cannot be understood as anything other than a racial classification. And that racial classification was employed to deny Baby Girl her most basic constitutional rights.

The consequences of ICWA's application for Baby Girl could not be more dramatic. In the absence of ICWA, Baby Girl is entitled to a best interests determination focused on her own well-being. But the courts below denied her that protection for no reason other than her race—more precisely, a fraction of her race. Instead of an adoption proceeding focused on Baby Girl and her best interests, the erroneous application of ICWA shifted the focus entirely. The only dispositive question in

the adoption proceedings was whether Birth Father was likely to "serious[ly]" harm Baby Girl if he obtained custody of her. While the best interests standard fully protected Baby Girl's most fundamental liberty interests—indeed, arguably the most relevant liberty interests a 27-month old child possesses—ICWA simply changed the subject and protected her not at all. The reason for that dramatic difference was not to protect existing Indian families or to avoid children being taken from the reservation or even to protect the sovereignty of tribal courts. The reason was Baby Girl's race as contributed by a biological father whose parental status was neither acknowledged nor established under applicable state law. ICWA does not require this unconscionable result. The Constitution does not permit it. The decision below must be reversed.

ARGUMENT

I. The Indian Child Welfare Act Did Not Mandate Or Permit The Removal Of Baby Girl From Her Adoptive Home

There is no question that under state law, Birth Father's failure to timely support Baby Girl deprived him of any standing to participate in the adoption proceedings. The South Carolina Supreme Court allowed Birth Father to block the adoption and obtain custody of Baby Girl based solely on its determination that ICWA mandated that result. That determination was in error. Birth Father is not an Indian "parent" entitled to enhanced parental rights under ICWA because the Act specifically excludes from its definition of "parent" any unwed biological father whose paternity is not legally

acknowledged or recognized. It is indisputable that as a result of his absence from Baby Girl's life prior to intervening in the adoption proceedings, Birth Father lacked any legally recognized parent-child relationship with Baby Girl under state law or the U.S. Constitution. Nothing in ICWA confers rights on unwed biological fathers who otherwise have failed to establish any parental status. And interpreting ICWA to empower an "unwed father" to trump Baby Girl's rights based solely on DNA, not the kind of affirmative steps that acknowledge or establish paternal rights under state law, exacerbates the constitutional problems that inhere in the statute. The lower court compounded its basic error and invited further constitutional difficulty by relying on provisions of ICWA that by their own terms have no application to the adoption of a child who was never domiciled on Indian land or in the legal or physical custody of an Indian parent.

A. Birth Father Is Not A Legally Recognized Parent Of Baby Girl Under South Carolina Law, The U.S. Constitution, Or ICWA

According to the court below, the determinative provision of ICWA mandating the custody transfer here is section 1912(f), which provides that "[n]o termination of parental rights may be ordered ... in the absence of a determination, supported by evidence beyond a reasonable doubt ... that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). Applying this provision, the court

concluded that the individual best interests of Baby Girl were no longer relevant, much less the focal point of the adoption proceeding as otherwise mandated by state law. Instead, Birth Father was entitled to custody of Baby Girl because, despite his expressed desire to relinquish his parental rights and failure to show any affirmative interest in Baby Girl until he was told about the adoption proceedings, the record did not establish beyond a reasonable doubt that his custody of Baby Girl would result in serious emotional or physical damage. Pet.App.29a.

That determination fails at the threshold because Birth Father is not a "parent" within the meaning of ICWA. Section 1903(9), consistent with background legal principles and this Court's due process precedents, treats unwed fathers distinctly. That section excludes from the Act's definition of "parent" "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). The Act does not provide a federal standard or procedure for determining whether paternity has been "acknowledged or established"; this omission is not surprising because the question whether a legal child-parent relationship exists is a function of state law. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004) ("Newdow's parental status is defined by California's domestic relations law."); *De Sylva*, 351 U.S. at 580. While federal law could provide a distinct definition, in the absence of any federal definition or federal procedure for acknowledging or establishing paternity the most logical inference is that Congress intended the statute to borrow the relevant state (or perhaps tribal in a case proceeding in tribal court) law. In

other words, the Act provides no rights for an "unwed father where paternity has not been acknowledged or established" under the applicable state law. The only thing ICWA is explicit about in this regard is that *not all unwed biological fathers* are "parents" entitled to invoke the Act.

The court below acknowledged that the Act "does not explicitly set forth a procedure for an unwed father to acknowledge or establish paternity," but nonetheless held as a matter of preemptive federal law that Birth Father met the Act's definition of "parent" because he "acknowledg[ed] his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establish[ed] his paternity through DNA testing." Pet.App.21a-22a. That holding was doubly mistaken. First, by failing to apply the South Carolina law governing when an unwed birth father establishes parental status, the courts below created unnecessary conflict between federal and state law (not to mention an unnecessary override of Baby Girl's right to a best interests determination). Second, even assuming Congress intended state courts to fashion a federal law of acknowledgement and establishment of paternity, the courts below adopted the wrong rule. The decision below relies on an erroneous and anachronistic interpretation of section 1903(9) that conflicts with the plain meaning of "acknowledged or established" paternity at the time of ICWA's enactment in 1978.

This Court has long recognized that "a biological parent is not necessarily a child's parent under law." *Astrue v. Capato*, 132 S. Ct. 2021, 2030 (2012). As

explained earlier, up until the 1970s, in most states the legal status of fatherhood arose almost exclusively from a man's marriage to the child's mother. *See supra* pp.4-5. Even where paternity was uncontested, an unwed father had virtually no legal recognition as a child's parent. In the 1970s, the law began to change, largely in response to a series of decisions by this Court distinguishing between unwed fathers who made timely, affirmative efforts to support and care for their children, and those whose parental claims were based on "the mere existence of a biological link." *Lehr*, 463 U.S. at 261. This Court explained that the former have a constitutionally recognized interest in maintaining their already-established relationship with their child, while the latter, consistent with the historical treatment of unwed fathers, have no parental rights. *See Quilloin*, 434 U.S. at 248-49.

Thus, a clear principle emerges from this Court's constitutional cases: biology alone does not confer parental rights on an unwed father; he has to earn those rights by affirmative acts establishing a relationship above and beyond the biological link. *Caban*, 441 U.S. at 392 ("In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child."); *Michael H.*, 491 U.S. at 142-43 (Brennan, J., dissenting) ("Though different in factual and legal circumstances, [our] cases have produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that

child, such a link combined with a substantial parent-child relationship will do so."); *Lehr*, 463 U.S. at 261 ("[T]he mere existence of a biological link does not merit equivalent constitutional protection. ... [T]he importance of the familial relationship to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association.").

In response to these cases, state legislatures adjusted their paternity and custody laws to reflect this basic principle: unwed fathers who timely seek to care for their children enjoy legally recognized parental rights, including the right to participate in custody and adoption decisions, while unwed fathers who renounce their rights or fail to promptly make such efforts do not. *See supra* pp.6-7 (citing state statutes). Reflecting the paramount interest of children in forming immediate and stable relationships with the caregivers who step forward in a birth father's absence, these laws strictly limit the window of opportunity for manifesting parental behavior. There is no grace period for birth fathers who change their mind or decide that although they were happy to terminate their rights in favor of the birth mother, they nonetheless want to block her decision that adoption is in the child's best interests.

When Congress chose in 1978 to limit the category of unwed fathers included in ICWA's definition of "parent" to those unwed fathers whose paternity was "acknowledged or established," it operated against the backdrop of the developing federal case law and state laws incorporating the principle that biology alone (or biology plus belated

interest) does not establish paternity. Timely affirmative actions were necessary for an unwed father to acknowledge or establish paternity. The House Report to the Act makes this much clear, explaining that the definition of "parent" in ICWA "is not meant to conflict with the decision of the Supreme Court in *Stanley*," the first of this Court's decisions distinguishing between unwed fathers who have taken the steps necessary to establish a legal child-parent relationship and those who have not. H.R. Rep. No. 95-1386, at 21 (1978), 1978 U.S.C.C.A.N. 7530, 7543 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972)).

The question of congressional intent on this point thus is starkly different from the question in *Holyfield*, where this Court concluded that Congress intended that the term "domicile" be applied according to federal common law rather than state law. 490 U.S. at 43-47. Unlike domicile, there is no developed federal common law defining parent-child relationships, because Congress and the federal courts have deferred to state law on this issue. *De Sylva*, 351 U.S. at 580. Thus, in the absence of any statutory definitions or procedure for establishing paternity, the most natural inference in that ICWA simply picks up the relevant state law for establishing paternity.

But in all events, even if there is to be a uniform federal rule for acknowledging and establishing paternity, as opposed to a uniform rule of borrowing the state law, there is no reason for that uniform federal rule to deviate from the dominant state practice and federal constitutional law at the time of

ICWA's passage. As this Court explained in *Reves v. Ernst & Young*, 494 U.S. 56, 78 n.* (1990), "in the absence of a federal law ... or other alternative sources for discerning the applicability of [a] statutory term ... we are dependent on the state common law at the time of the Act's creation as a basis for a nationally uniform answer to this 'federal question.'" *See also Holyfield*, 490 U.S. at 47 ("That we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine 'the ordinary meaning of the words used.' Well-settled state law can inform our understanding of what Congress had in mind when it employed a term it did not define.").

As a result of Birth Father's failure to timely support and care for Baby Girl, his paternity is neither acknowledged nor established by the U.S. Constitution or the laws of South Carolina, Oklahoma, and many other states. At the time that Birth Father sought to intervene in the adoption proceedings, he acknowledged that he told Birth Mother that he relinquished his parental rights and that he had made absolutely no affirmative efforts to provide any support to Birth Mother or Baby Girl or even to inquire about Baby Girl's well-being or whereabouts after her birth. Pet.App.4a, 44a-48a. Birth Father's parenting efforts thus fall far short of even the minimal efforts this Court has recognized as *inadequate* to establish a constitutionally recognized parent-child relationship. *See, e.g., Lehr*, 463 U.S. at 248-50, 269 (birth father lacked standing in adoption proceedings despite offering financial assistance to the mother and visiting the baby at the hospital after

birth and thereafter whenever birth mother permitted); *Quilloin*, 434 U.S. at 246-51 (birth father lack standing in adoption proceedings despite occasional visits, and some financial support, toys and gifts).

And as the South Carolina Supreme Court recognized, Birth Father's abandonment of Baby Girl during the pregnancy and for the first four months of her life likewise deprived him of any standing under state law to participate in her adoption proceedings. S.C. Code § 63-9-310(A)(5); Pet.App.21a-22a n.19 (acknowledging that "[u]nder state law, Father's consent to the adoption would not have been required" and his parental rights "would be terminated under state law without further inquiry").[10]

By the lower court's reasoning, none of this matters because, *after* Birth Father realized that his voluntary relinquishment of his parental rights would facilitate Baby Girl's adoption rather than leave Birth Mother solely responsible for Baby Girl's care and custody, Birth Father lodged an objection to the adoption "acknowledg[ing]" his paternity, and he subsequently "established" his biological relationship to Baby Girl through DNA testing. Pet.App.21a-22a. That interpretation of ICWA's "acknowledged or established" language is not sustainable. The notion that an unwed father can obtain the full suite of dramatic rights under ICWA (with their even more

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[10] Oklahoma law compels the same result. Okla. Stat. tit. 10, § 7505.4.2(C).

dramatic effect on the rights and fate of Baby Girl) simply by raising a hand and an objection and thereby acknowledging his paternity makes no sense. If all an unwed father needed to obtain full parental status was to assert his ICWA rights, there would have been little need for ICWA's differential treatment of unwed fathers. Nor is it plausible that Congress anticipated that DNA tests that did not even exist in 1978 would be the mechanism for "establish[ing]" paternity under ICWA. Such an interpretation would be plainly incompatible with the state of the law at the time of ICWA's enactment and antithetical to Congress' express efforts to harmonize the Act's definition of "parent" with this Court's cases. A biological link confirming acknowledged paternity has never been enough to qualify an unwed father for the benefits of paternity, and ICWA did not usher in a silent revolution in paternity rights.

Moreover, as developed more fully below, the lower court's interpretation is not just an implausible reading of a statute enacted in 1978, but also an unconstitutional one. ICWA confers powerful rights on Indian parents and tribes that come into collision with Baby Girl's own liberty interests. The federal government obviously may take steps to ensure the preservation of tribal sovereignty and accordingly has a relatively free hand to draw distinctions when it comes to Indian lands and tribal authority. But the federal government does not have any license to treat Native Americans differently from others based solely on biology and race. By (mis)interpreting ICWA to allow unwed Indian fathers—alone among all unwed fathers—to establish paternity based on

biology alone, the court below unnecessarily creates grave doubts about ICWA's constitutionality.

B. ICWA Does Not Require Removing A Child From An Adoptive Home Chosen By A Non-Indian Birth Parent Who Had Sole Legal And Physical Custody Over The Child Due To The Birth Father's Voluntary Abandonment Of The Child Before Birth

Even aside from its mistake in conferring parental status to Birth Father, the lower court's application of ICWA must be reversed because it erroneously relied on provisions that by their own terms establish that the Act has no application to the adoption of a child who was never in the legal or physical custody of an Indian parent to begin with due to the Indian parent's abandonment of the child at birth. Indeed, in the present case, Birth Father abandoned Baby Girl in utero, rendering Birth Mother, a non-Indian, her sole physical custodian and legal parent from the moment of her birth. *See* Okla. Stat. tit. 10, §§ 7501-7505. Immediately after, Birth Mother exercised her sole legal decision-making authority over Baby Girl to make what she believed was the best choice she could make for her daughter: to place her with Adoptive Couple, whom she had personally and carefully chosen to raise and care for Baby Girl. And from that moment forward through the adoption proceedings two years later, Adoptive Couple was the only family that Baby Girl knew.

By its plain terms, ICWA has no application to these circumstances. To begin with, section 1912(f),

the provision that the lower court relied on to transfer custody to Birth Father, Pet.App.28a-33a, cannot logically operate to foreclose the termination of Birth Father's parental rights because it focuses exclusively on whether "the *continued* custody of the child by the parent" will cause serious emotional or physical damage to the child. 25 U.S.C. § 1912(f) (emphasis added). The use of the word "continued" was neither inadvertent nor something that courts are free to ignore. Applying that provision in a situation like this makes nonsense of it—there is no custody to continue. And the underlying inquiry does not make sense: when an Indian parent has custody, there is an existing potential for abuse that can be meaningfully evaluated and it would make sense to remove the child from that pre-existing custody only if a substantial showing of emotional or physical damage is made. But when the Indian parent has never exercised any custody over the child, there is no reason the statute would place a strong thumb on the side of continuing custody that never existed. Nor in any but the rarest of cases will it be possible to demonstrate that serious emotional or physical damage will ensue. It is the assumption of pre-existing custody and the possibility of evidence of abuse in that relationship that makes this provision make sense. Applying it where there is no pre-existing legal or physical custody takes a provision designed to minimize transfers out of pre-exiting custody and converts it into a rule of almost automatic transfer based on race. There is no reason to think Congress countenanced this dramatic interference with the liberty interests of children like Baby Girl.

Indeed, throughout ICWA, Congress included language triggered only by previous legal or physical custody by the Indian parent, or at least some sort of state action preventing the Indian parent from obtaining legal or physical custody of the child. *See id.* § 1902 (ICWA establishes "minimum Federal standards for the *removal* of Indian children from their families") (emphasis added); *id.* § 1901(4) (ICWA seeks to prevent Indian families from being "*broken up* by the *removal*, often unwarranted, of their children ... by nontribal public and private agencies") (emphasis added); *id.* § 1912(d) (requiring provision of "remedial services ... designed to *prevent the breakup* of the Indian family") (emphasis added); *id.* §1913(c) (voluntary consent to adoption may be withdrawn "for any reason ... and the child shall be *returned* to the parent") (emphasis added). None of these provisions has any reasonable application where the Indian parent voluntarily abandoned the child at birth to the non-Indian parent—under these circumstances, there is no Indian family to "breakup" and no Indian parent from whom the child can be "removed."

The Bureau of Indian Affairs ("Bureau") Guidelines for Indian Child Custody Proceedings likewise reflect that at the time of ICWA's enactment, the Bureau did not envision the Act applying to children who were never domiciled on a reservation and who were always within the sole legal and physical custody of a non-Indian parent due to abandonment at birth by the Indian parent. The Bureau described section 1912(f) as providing that "[a] child may not be *removed* simply because there is someone else willing to raise the child who is likely to

do a better job .... It must be shown that it is dangerous for the child to *remain* with his or her *present* custodians." Bureau Guidelines D.3 Commentary (emphasis added). Indeed, the Guidelines recognize that the statutory standard assumes there is pre-existing custody to evaluate. *See id.* at D.4 Commentary ("[T]he issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur *if the child is not removed.*") (emphasis added).

Apparently recognizing that these provisions cannot be applied in this case according to their plain meaning, the lower court improperly took it upon itself to re-write them. Unable to assess the impact of Birth Father's "continued custody" under section 1912(f), the lower court inquired instead whether Birth Father would likely cause serious emotional or physical harm to Baby Girl if he were to obtain custody of her in the future. Pet.App.28a-33a. And unable to determine whether the State had provided remedial services "designed to prevent the breakup of the Indian family" before removing Baby Girl from Birth Father's custody—a nonsensical, counter-factual requirement where the Indian father's voluntary abandonment of the child before birth foreclosed the initial formation of an Indian family—the lower court transformed section 1912(d) into a requirement that Birth Mother and Adoptive Couple offer "remedial services" to Birth Father after learning about his Cherokee status in an effort to convince him to change his mind about abandoning Baby Girl. Pet.App.26a-27a. And, perhaps most absurd of all, the lower court blamed Birth Mother

for failing to adhere to section 1915(a)'s placement preferences when, as a non-Indian, single pregnant woman who was told by the Tribe that the father of her unborn child was *not* a registered member, she chose Adoptive Couple to adopt Baby Girl rather than contacting the Tribe to assist her in finding a Cherokee adoptive family. Pet.App.37a-39a.

Of course, it is not the place of courts to rewrite federal statutes to fit circumstances not contemplated by Congress. If Congress had intended the Act to apply to adoption proceedings involving children who have no tribal connection beyond the genetic material of a biological father who abandoned the child before birth, it would have provided language allowing for that application. If it had provided such language, it presumably would have used the best interests of the child—rather than the absence of strong evidence of abuse—as the standard in such circumstances. And any effort to build in special advantages based on biology, rather than connections to tribal lands, would have raised serious constitutional concerns.

It is not an accident that ICWA includes no mechanisms for disrupting the adoptive placements of children who are not domiciled on tribal land and were never legally or physically part of an Indian family due to abandonment by the Indian parent. Indeed, although by 1987 numerous state courts had held that ICWA does not apply under such circumstances, the Senate Committee on Indian Affairs rejected a proposed amendment that would have extended the application of ICWA to children eligible for tribal membership regardless whether the

child previous lived on a reservation, in an Indian cultural environment, or with an Indian parent. *See* S.1976, 100th Cong., 1st Sess., 133 Cong. Rec. S18532, S18533 (daily ed. Dec. 19, 1987). Especially in light of that rejection, courts should not lightly assume that Congress intended to enter these uncharted and constitutionally problematic waters.

It is one thing, as in *Holyfield*, to recognize tribal sovereignty over custody determinations involving children who remain domiciled on tribal land despite the efforts of their birth parents to abandon them off-reservation. It is quite another matter to expand ICWA to govern the custody proceedings of children who have not even the remotest non-biological relationship to the tribe that seeks to "retain[]" them. *Holyfield*, 490 U.S. at 37. As many courts have recognized, to tear a young child away from the only parents she has ever known, for no reason other than a biological connection to an Indian parent who abandoned her at birth, does not further the purposes of the Act, but simply inflicts tragedy upon the child.

In *In Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988), for example, the Indiana Supreme Court held that where the Indian birth mother placed the child for adoption six days after birth and had almost no further contact with the child until seven years later, the birth mother could not invoke ICWA to remove the child from her adoptive family. The court explained that although "the child's biological ancestry is Indian, ... her entire life of seven years to date has been spent with her non-Indian adoptive parents in a non-Indian culture.

While the purpose of the ICWA is to protect Indian children from improper removal from their existing Indian family units, such purpose cannot be served in the present case." *Id.* at 303.

Similarly, in *In the Matter of the Parental Rights as to N.J.*, 125 Nev. 835 (2009), the Nevada Supreme Court found ICWA inapplicable to a child who was placed in foster care at birth because of her non-Indian birth mother's drug use and raised by the foster family without objection from the mother until they sought to adopt the child 18 months later. The court refused to allow the non-Indian birth mother to rely on section 1912(f) to block the termination of her parental rights, explaining that "the application of the ICWA to this case would serve only one purpose: to deprive N.J. of the only home she has ever known and come to love." *Id.* at 848.[11]

So, too, here. Neither the text nor purpose of ICWA allow a biological parent who abandoned a child at birth to later exploit the Act to take the child from the family that raised her in the biological

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[11] *See also, e.g.*, *S.A. v. E.J.P & R.L.P.*, 571 So.2d 1187, 1189 (Ala. Civ. App. 1990) (rejecting birth father's attempt to use ICWA to block the adoption of a three year old child by the great-aunt and great-uncle who had raised her after the father abandoned her, explaining that because the father "never exercised his parental responsibilities and never attempted to become a part of the child's life, ... [t]he child was never a part of an Indian family environment"); *In the Interest of S.A.M.*, 703 S.W.2d 603, 608 (Mo. Ct. App. 1986) (refusing to allow birth father to invoke ICWA to remove a seriously handicapped 7-year-old child from the foster parents who had raised her since birth).

parent's absence. As this Court recognized in *Quilloin*, 434 U.S. at 255, "the result of [an] adoption" under these circumstances is not to "breakup" a hypothetical family that the birth father intentionally refused to form, but "to give full recognition to a family unit already in existence."

II. The Lower Court's Erroneous Interpretation Of ICWA Raises Serious Constitutional Problems

The lower court's erroneous interpretation of ICWA is not only contrary to the statutory text and congressional intent, but also raises serious constitutional problems.

Correctly interpreted, the Act limits its application to adoption and custody proceedings involving children who are either domiciled on a reservation or have some other tribal connection beyond biology. These limitations are crucial to preserving the Act's constitutionality, ensuring that the Act's differential treatment of Indians operates only to promote tribal sovereignty and the unique interests of Indians as tribal citizens, and not as invidious racial discrimination that arbitrarily trumps Baby Girl's liberty interests. As explained in section I.A., section 1903(9)'s definition of parent, properly interpreted, avoids these difficulties by declining to give an unwed Indian father rights based on biology alone that no non-Indian unwed father enjoys. And as explained in section I.B., there is language throughout ICWA limiting the Act's application to children in the pre-existing custody of an Indian parent or other circumstances in which there is a distinct connection to tribal interests.

The lower court ignored these limitations and applied the Act to require the removal of Baby Girl from her adoptive family based solely on a sliver of genetic material inherited from a birth parent she had never met because he intentionally abandoned her before birth. The application of ICWA under these circumstances did not prevent the breakup of an Indian family, preserve any existing tribal relationships, promote tribal sovereignty, or serve any other constitutionally permissible purpose. Instead, it operated as a race-based preference for Birth Father, allowing him to invoke his Indian heritage to block the adoption of a child to whom he had no claim under state law or the Constitution. More tragically, it operated as race-based detriment for Baby Girl, extinguishing her right under state law to have *her* best interests determine whether her adoption was finalized. This outcome must be rejected as antithetical to the equal protection and due process clauses of the Constitution.

A. The Lower Court's Application Of ICWA Deprived Baby Girl Of An Adoption Determination Based On Her Best Interests

Under state law, Baby Girl and her interests were to be the focus of the adoption proceedings. She had the right to have her best interests be "the primary, paramount and controlling consideration of the court" in resolving the dispute over her adoption. *Cook*, 271 S.C. at 140. The inquiry into Baby Girl's best interests would have considered "the character, fitness, attitude, and inclinations on the part of each parent as they impact the child," as well as the

"psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life." *Woodall*, 322 S.C. at 11.

This "best interests of the child" standard has been applied by American courts in custody proceedings for 200 years and is universally recognized by both state and federal courts as the cornerstone for resolving custody disputes. *See, e.g.*, *Finlay v. Finlay*, 240 N.Y. 429, 433 (1925) (Cardozo, J.) (in custody disputes, the judge must act "as parens patriae to do what is best for the interests of the child. He is to put himself in the position of a 'wise affectionate and careful parent,' ... and [to] make provision for the child accordingly"); Joseph Story, 2 *Commentaries on Equity Jurisprudence as Administered in England and America* 675-77 (13th ed. 1886) (tracing the origins of the best interests of the child standard to the English parens patriae doctrine).

In sum, the best interests standard has "exist[ed] from time immemorial and has become the bedrock of our state custody statutory law"—it is "a right that is 'so rooted in the traditions and conscience of our people as to be ranked as fundamental or implicit in the concept of ordered liberty.'" Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 St. Louis U. L. J. 113, 160-61 (2009) (quoting *Michael H.*, 491 U.S. at 127 n.6); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The goal of granting custody based on the best interests of the child is indisputably a substantial government

interest for purposes of the Equal Protection Clause.").

There can be no doubt that the erroneous application of ICWA in this case profoundly transformed the nature and outcome of Baby Girl's adoption proceedings. The change worked by the courts' application of ICWA was not subtle. It was Copernican. Instead of a proceeding focused on Baby Girl and her best interests, the lower courts shifted the inquiry entirely to Birth Father and whether he posed an affirmative danger. Having wrongly determined that ICWA governed the custody dispute, the lower courts replaced the traditional best interests inquiry with a federal rule mandating her transfer to Birth Father—a man she had never met and who had no parental rights under state law or the Constitution—so long as it did not appear likely that Birth Father would inflict "serious emotional or physical damage" on Baby Girl. Pet.App.28a-33a; *see also* Pet.App.54a-55a (criticizing "the majority's approach of applying ICWA in a rigid, formulaic manner without regard to the facts of the particular case and the best interests of the Indian child").

In stark contrast to the best interests standard, the federal rule eliminated any consideration of Birth Father's "lack of interest or support for Baby Girl" before the adoption proceedings, Pet.App.32a n.26, or Baby Girl's emotional attachment to the adoptive family that had cherished and cared for her since the moment of her birth and provided her a loving, stable home during Birth Father's intentional absence from her life, Pet.App.75a. None of that mattered to the lower court—as an "Indian child," Baby Girl's best

interests were deemed automatically aligned with the Tribe's interest in having her raised by a tribal member, and the only dispositive question was whether Birth Father was likely to "serious[ly]" harm Baby Girl if he obtained custody of her. Pet.App.28a-37a. And having determined that such serious damage was unlikely to occur, the trial court ordered Baby Girl, then 27 months old, removed from the only family she had ever known and sent to live with a man who, due to his own conduct, was a stranger to her. In short, an outcome that would have been unthinkable under the traditional best interests inquiry was, by the lower court's reasoning, mandated by federal law.

To be sure, in custody proceedings involving children domiciled on a reservation or who have some other non-biological tribal connection, federal rules designed to prevent the breakup of the Indian family may legitimately "further Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). As this Court explained in *Holyfield*, because tribes have exclusive jurisdiction over custody proceedings involving children domiciled on tribal lands, "[i]t is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interest of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw community." *Id.* at 54.

But none of that has anything to do with this case. Baby Girl is a predominantly Hispanic child with a 3/256th quantum of Cherokee blood she inherited from a biological father who abandoned her

at birth to the sole legal and physical custody of her non-Indian birth mother. Neither Birth Father, Birth Mother, nor Baby Girl was domiciled on a reservation and Baby Girl had no other tribal connection beyond a sliver of genetic material. To deprive Baby Girl of her right to an individual best interests inquiry based solely on her race—or more precisely, a tiny fraction of her race—is exactly the sort of invidious discrimination and deprivation of liberty this Court has long held prohibited by our Constitution.

B. The Lower Court's Application Of ICWA To Remove Baby Girl From Her Adoptive Home Violated Baby Girl's Equal Protection Rights

The Equal Protection Clause protects adults and children alike from differential treatment based on race or ancestry. *See Brown v. Board of Education*, 347 U.S. 483 (1954). In *Palmore*, 466 U.S. at 434, this Court struck down the use of racial classifications to remove a child from an appropriate custody placement. This case is no different. Baby Girl's Indian blood quantum was the sole reason the lower court ordered her removed from the loving, stable home she had lived in since birth and placed with a biological father whose failure to timely care for her extinguished any parental rights he might otherwise have had under state law or the Constitution. This Court "has consistently repudiated [such] distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the

doctrine of equality." *Regents of University of California v. Bakke*, 438 U.S. 265, 294 (1979).

Of course, this Court has sanctioned differential treatment of Indians arising out of Congress' treaty obligations and responsibilities to the tribes as sovereign entities, *see Rice v. Cayetano*, 528 U.S. 495, 519 (2000), including legislation that "singles out Indians for particular and special treatment" designed "to further Indian self-government," *Mancari*, 417 U.S. at 554-55. Thus, in *Mancari*, this Court upheld a racial preference for Indians in hiring by the Bureau of Indian Affairs because that agency governs the "lives and activities" of Indians "in a unique fashion." *Id.* at 554. The Court emphasized, however, that it would be an "obviously more difficult question" if Congress were to extend that preference to other government agencies or create "a blanket exemption for Indians from all civil service examinations." *Id.*

The key to whether legislation involving Indians triggers the relaxed review of *Mancari*, or the exacting scrutiny traditionally demanded of classifications based on race, is whether the challenged legislation "relates to Indian land, tribal status, self-government or culture." *Williams v. Babbitt*, 115 F.3d 657, 664-65 (9th Cir. 1997). When a racial classification is tethered directly to tribal land or tribal self-government, the political and racial aspects of the regulation are inextricably intertwined, such that treating the laws as involving ordinary racial classifications would deny the federal government its authority under the Treaty and Indian Commerce Clauses. But when tribal

preferences are untethered from tribal land or tribal self-government and simply provide a naked advantage (or disadvantage) based on race, strict scrutiny is imperative.

When interpreted correctly, ICWA serves the legitimate purpose of preventing the involuntary removal of Indian children from their families and, in cases involving the custody of Indian children domiciled on tribal land, ensuring the tribe's ability to exercise its sovereignty over the custody proceedings. *See Holyfield*, 490 U.S. at 30-37 (describing purposes of ICWA). But it is another thing entirely to employ race-based preferences in adoption proceedings where the child is in the exclusive custody of a non-Indian parent who, as the only legally recognized parent of the child, has chosen to place the child for adoption and where the unwed father—were he of any other race—would have no rights whatsoever. Conferring special privileges on the biological father—or more to the point, special disabilities on a child—simply because of race serves no purpose relating to "Indian self-government," *Mancari*, 417 U.S. at 555; to the contrary, the child's home is already outside the tribe, not because the non-Indian mother decided to place the child for adoption, but because the Indian father previously abandoned the child to the non-Indian mother. Surely the application of ICWA under these circumstances is exactly the sort of race-based differential treatment this Court has long understood to violate the Equal Protection Clause.

C. The Lower Court's Application Of ICWA To Remove Baby Girl From Her Adoptive Home Violated Baby Girl's Fundamental Liberty Interests

The lower court's erroneous interpretation of ICWA also violated Baby Girl's fundamental liberty interests. This Court has long recognized that the maintenance of "certain intimate human relationships" must be "secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Foremost among these "intimate human relationships" is "the creation and sustenance of a family." *Id.* at 617-19. And "to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation." *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting). Indeed, it is hard to imagine what liberty interest is more important to a 27-month old child than maintaining the only family bonds she has ever known, absent a strong showing of necessity. And precisely because a 27-month old is not well-positioned to assert those liberty interests, the courts, and guardians ad litem, vindicate those liberty interests through the time-tested best interests standard. Rendering that standard irrelevant based on nothing more than race surely raises grave constitutional difficulties.

This Court has also long recognized that "biological relationships are not the exclusive determination of the existence of a family"; instead, "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association. ... No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 843-44 (1977). These relationships are accordingly granted "a substantial measure of sanctuary from unjustified interference by the State," *Roberts*, 468 U.S. at 618, in which a child, no less than a parent, may seek shelter. *See Reno v. Flores*, 507 U.S. 292, 304 (1993); *cf. Plyler v. Doe*, 457 U.S. 202, 223 (1982).

There can be no dispute that the lower court's application of ICWA in this case resulted in Baby Girl's removal from the only "intimate human relationships" she had ever known. Certainly there are some circumstances—such as in cases of abuse or neglect—where the government may, indeed should, interfere with a child's family relationships in order to protect her best interests. And where, as in *Holyfield*, a tribe's sovereignty over its own citizens is at stake, such intrusion may be warranted by such distinctly federal interests. *See Holyfield*, 340 U.S. at 54. But as a general matter, the best interests standard operates to protect the liberty interests of the child. Thus, any federal effort to override the traditional best interest standard risks implicating

constitutional concerns and any effort to do so based on race alone would have to satisfy strict scrutiny.

That latter point makes this case fundamentally unlike *Holyfield* where there was a clear connection between the children and tribal sovereignty and tribal land. In those circumstances, federal law can be understood to classify on a basis other than race. Not so here. ICWA applied here solely because of race and the effects were dramatic. But for Birth Father's race (and the courts' misinterpretation of ICWA), he would have no parental rights at all. But for Baby Girl's race (and the courts' misinterpretation of ICWA), she would have been entitled to a proceeding focused on her best interests and fully protective of her liberty interests. No compelling interest could justify this remarkable reversal of the focus and equities. This case is not about whether race can be a tie-breaker in determining which company receives a highway contract. It is a case about whether race, and race alone, can convert someone from a complete stranger to the custody proceedings to the person with a virtual guarantee of custody, and whether race, and race alone, can deprive a young girl of an inquiry focused on her best interests and ultimately deprive her of the only home she has ever known.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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February 19, 2013

RESPONDENT'S BRIEF

No. 12-399

In the
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

REPLY BRIEF FOR GUARDIAN AD LITEM, AS REPRESENTATIVE OF RESPONDENT BABY GIRL, SUPPORTING REVERSAL

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April 9, 2013

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ARGUMENT

Birth Father ("Father") and the Tribe make much of the conceded fact that Baby Girl is an "Indian child" under ICWA. But it is equally incontestable that that is so only because of her race—or "biolog[y]" to use ICWA's terminology. Baby Girl has no other connection to the Tribe beyond a biological link to a man who abandoned her and who is wholly without constitutional or state-law parental rights. Neither of her birth parents was a resident of or domiciled on a reservation. Baby Girl's sole link to any tribe is her 3/256ths of Cherokee blood. The central question in this case is whether that is enough to work a Copernican shift in the relationship between the parties. No one disputes that if ICWA does not apply, Baby Girl is entitled to a custody determination that focuses on *her* best interests. Yet according to the courts below and respondents supporting their judgment, under ICWA that inquiry is entirely irrelevant; she must be separated from the only family she ever knew absent a showing "beyond a reasonable doubt" that Father would inflict "serious emotional or physical damage to the child." 25 U.S.C. § 1912(f).

If ICWA really imposed those draconian consequences on Baby Girl solely because of her race, it would be plainly unconstitutional. Those supporting the judgment below attempt to defend ICWA as a political classification subject only to rational basis review. That is certainly true of the jurisdictional provision at issue in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), and may well be true of ICWA's application to those

domiciled on reservations, but it cannot be true in a case like this when the only basis for ICWA's obliteration of Baby Girl's state-law and constitutional rights is her 3/256th quantum of Cherokee blood.

Fortunately, there is a saving construction that avoids all these constitutional difficulties. Indeed, any fair reading of ICWA makes clear that it was intended to protect pre-existing Indian families and pre-existing Indian custody, not to override traditional understandings by vesting unwed fathers who had relinquished their parental rights with completely unprecedented powers to change their mind and displace the best interests standard and the constitutional rights of children, like Baby Girl.

I. The Record Makes Clear That Father Abandoned Any State-Law Parental Rights And Cannot Shift The Blame To Birth Mother Or The Guardian

Father goes to great lengths to portray the tragic disruption of Baby Girl's familial bonds as resulting not from the lower courts' application of ICWA, but from procedural missteps attributable to everyone except Father. Father's narrative is demonstrably false, but it is also irrelevant. Nothing in this effort to shift blame changes two irrefutable facts: 1) Father voluntarily relinquished his parental rights (via text and subsequent actions and inactions) under state law, and so, but for ICWA, he would have no parental rights whatsoever and no basis to interfere with Baby Girl's best interests, and 2) the one party who everyone agrees bears no responsibility for any

procedural missteps, misspellings or confusion is Baby Girl.

A. Father's Testimony and Admitted Conduct Establish Beyond Doubt That Father Intentionally Abandoned Baby Girl and Had No Legally Recognized Relationship to Her at the Time of the Adoption Proceedings

It is uncontested that in no uncertain terms, Father told six-months pregnant Birth Mother ("Mother") that he wanted to "give up" his parental rights rather than provide any financial support for the pregnancy or for Baby Girl after she was born. Pet.App.45a, 89a. Father's own testimony establishes that from that moment forward, he made no attempt to inquire about the pregnancy, the birth, or Baby Girl's well-being or whereabouts. Pet.App.48a; R.O.A.514; Tr.532, 547. And when, four months after Baby Girl's birth, he was served with papers that he believed would officially terminate his parental rights and leave Mother as Baby Girl's sole legal parent, he signed them, explaining that he did so because he did not want to "be responsible in any way for the child support or anything else as far as the child's concerned." Pet.App.46a.

Father now claims that he "mistakenly thought" that he was "agreeing" only that Mother would have "full custody" of Baby Girl similar to his arrangement with his ex-wife regarding his older daughter. Father Br. 8. But when asked by his attorney whether he believed that Mother "would basically have full custody ... of this child similar to the arrangement that your ex-wife has with [your older

daughter]," Father replied, "Correct, but *without me there*." Tr.535-36 (emphasis added). Indeed, "without me there" perfectly captures both Father's express relinquishment of his parental rights in June 2009 and his conduct effectuating that abandonment in the seven months that followed.

Father also seeks to blame Mother for failing to seek him out to tell him about the adoptive placement, but he does not contest that state law places full responsibility on the unwed biological father to follow up with the birth mother about the child's status. *See* Mother Br. 6. Notably, there are no allegations that Mother ever deceived Father or that Father faced even the slightest difficulty finding out about the placement. To the contrary, Father concedes that in the seven months following his text message to Mother, *he did not once ask about Baby Girl's well-being or whereabouts.*[1]

Father's efforts to portray the adoptive placement as procedurally flawed likewise are foreclosed by the record. The August 2009 letter that Mother's attorney sent the Tribe inquiring about Baby Girl's status cannot establish any procedural defect in the adoption proceedings, because no law required notification to the Tribe at that point. J.A.5-6. And although Father asserts that Mother misstated Baby Girl's race on the form submitted to

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[1] Although Father's brief suggests "conflicting testimony" on this point, Father Br. 9 n.3, Father testified himself that he made no attempt to inquire about Baby Girl either before or after her birth. Tr.490-92, 525, 532, 547.

Oklahoma to obtain permission for the adoptive placement, the relevant form unequivocally states that Baby Girl has, *inter alia*, "Native American Indian" heritage, and both Oklahoma and South Carolina signed their consent to the adoptive placement on that very form. J.A.28.

Remarkably, the only person who ever misled tribal or state authorities about Baby Girl's Indian heritage was Father, who signed a sworn legal complaint stating that he was *not* Indian and that ICWA was inapplicable. Pet.App.9a; R.O.A.708. Only when the Tribe intervened in the proceedings in March 2010 did either Mother or petitioners have any notice that Baby Girl's adoption might be thwarted because of ICWA. At that point, Baby Girl was over six months old and had been cared for by petitioners as their child her entire life. J.A.44-49.

B. Father's Accusations of Bias by the Guardian Are Baseless and Irrelevant

Father's brief includes a series of baseless and irrelevant accusations against the Guardian, in an apparent effort to paint her as biased. Father Br. 11-13. As an initial matter, these allegations are just that; they are nothing more than unsubstantiated and contested allegations by Father and his mother specifically intended to discredit the Guardian's report. *See, e.g.*, Tr.625 (Father's counsel explaining that her trial strategy involved attacking the Guardian's credibility). Not a word of that testimony was ever credited by the lower courts. *See, e.g.*, Tr.595-96 (the trial court instructing Father's counsel that "you really do need to move on" from attacking

the Guardian because "She's been appointed. She is the Guardian ad Litem.").

Indeed, these allegations not only were not credited, they were directly rebutted by the Guardian's testimony. *See, e.g.*, Tr.591-92 ("I never ever knew [petitioners] until I had been appointed to this case [in November 2009]."); Tr.626-27 (explaining that she did not initially plan to travel to Oklahoma to visit Father's home because she had already concluded from a background check and phone interviews that the home was safe and she did not want to impose unnecessary costs on Father, who would have to bear her travel expenses); Tr.645-46, 650 (explaining that she described petitioners' home to Father's family only because they asked her); Tr.640-44, 649 (explaining that Father's family described themselves as prayerful people and that she spoke about prayer with them because she could tell it was "a very tough time" for them and she wanted to be "comforting" and "an encouragement" to them); Tr.634, 636 (denying that she made any derogatory statements about Indian dances and "get togethers," and observing that her grandmother was Cherokee and that she's "very proud of that").

In all events, these accusations are wholly irrelevant to the proceedings before this Court—indeed, Father does not suggest otherwise. He concedes that the Guardian was appointed to determine and advocate Baby Girl's best interests, continues to represent Baby Girl before this Court, and has standing to press all of the legal arguments in the Guardian's opening brief. Father Br. 11-13.

Nor does he suggest that his allegations have any bearing on the merits. Father notes, as did the Guardian in her opening brief, that the parties agreed that the trial court would not consider "a provision" in the Guardian's report stating the Guardian's recommendation regarding which custody placement would be in Baby Girl's best interests. Tr.672; *see* Father Br. 13; Guardian Br. 22-23 n.8. But that agreement did not render the factual conclusions (as opposed to recommendations) in the Guardian's report irrelevant. What rendered the conclusions in the report, including those concerning Baby Girl's best interests, irrelevant was the lower court's fundamental misconstruction of ICWA.

* * *

The key takeaway from the record in this case is the indisputable and indeed uncontested fact that, if not for ICWA, Father would have had no standing whatsoever to participate in Baby Girl's adoption proceedings and the adoption would have been finalized as consistent with Baby Girl's best interests. The question before this Court is whether Congress intended to upend that outcome for no reason other than Baby Girl's Indian blood quantum.

II. The Lower Court's Application Of ICWA To Remove Baby Girl From Her Adoptive Home Is A Perversion Of The Act's Text And Purposes

It bears repeating: The record establishes that *every step* of the adoptive placement process complied with applicable law and that, but for ICWA, the focus of the proceedings would have been on Baby Girl and her best interests. Instead, the lower courts held

that under ICWA, Father could assert his tribal membership more than six months after Baby Girl's birth (and more than 9 months after he voluntarily relinquished his rights), and that assertion changed everything. Under this view, ICWA transformed Father from a complete stranger to the adoption proceedings into their only focus. Unless it could be shown beyond a reasonable doubt that bestowing custody on Father would cause "serious emotional or physical damage to the child," ICWA mandated overriding the judgment of her mother and destroying the only family bonds that Baby Girl had ever known. And Baby Girl lost her state-law entitlement to custody proceedings focused on her best interests based on the bare fact that she is 3/256th Indian because of a biological link to a man who, but for ICWA, would have no parental rights. Only the clearest of statutory texts would compel a court to countenance this heart-breaking result and to confront the constitutional questions it would prompt. ICWA does not come close to compelling this heartbreak. Instead, it avoids the problem entirely by presumptively excluding unwed fathers from the Act. Moreover, the provisions applied below clearly contemplate pre-existing custody by an Indian family or Indian custodian. Applying those provisions here perverts the statutory scheme and produces results, including the one sanctioned below, that Congress did not intend and would not countenance.

A. The Statutory Text Establishes That Congress Did Not Intend ICWA to Thwart Baby Girl's Adoption.

The Guardian fully agrees with and incorporates petitioners' thorough rebuttal of Father's efforts to defend the decision below as consistent with the statutory text. Pet. Reply Br. 2-15. But the problems with Father's effort at statutory construction go beyond his inability to explain away statutory terms (*e.g.*, "breakup" and "continued custody"). At a much more fundamental level, Father fails to explain how a statute that presumptively excludes unwed fathers and seeks to avoid the breakup of Indian families could command the result reached below (let alone do so constitutionally).

As explained in petitioners' and the Guardian's opening briefs, Section 1903(9) presumptively excludes unwed fathers. While all other biological parents of an Indian child are "parents" with certain rights under ICWA, an unwed father is excluded unless paternity is "acknowledged or established." Father offers two related principal responses. Both are flawed. First, he suggests that a DNA test has established his paternity. But ICWA pre-dated effective DNA testing and ICWA presumes a biological link and nonetheless presumptively excludes unwed biological fathers. Thus, ICWA clearly requires something more than a DNA test. Father suggests that the something more is just whatever state law requires for paternity, and criticizes petitioners and the Guardian for conflating state-law concepts of paternity and paternal rights. But in the context of ICWA and its allegedly

transformative effect on Father and Baby Girl's relative rights, it is clear that the latter concept is what matters. To be sure, it is possible to read 1903(9) as fundamentally transforming family law and treating as indistinguishable a rapist (who must pay child support if paternity is established) and a committed father who has voluntarily offered not only financial assistance but active parenting support. But it is not remotely plausible to attribute that bizarre intent to Congress when there is a far more plausible reading that comports with traditional notions of family law and ICWA's broader purposes.

The Tribe and Father would like to read ICWA as promoting the interests of the Tribes and parents of Indian children *uber alles*. But ICWA is a more modest measure designed to prevent the breakup of existing Indian families. Nothing better illustrates ICWA's more modest focus than Father's tortured efforts to fit himself into Sections 1912(d) and 1912(f), the two provisions relied upon by the lower court in transferring Baby Girl's custody. Father's effort to ignore 1912(f)'s reference to "continued custody" is a bridge too far even for the Solicitor General. Gov't Br. 25-26. Especially when read in light of 1912(e) and its identical reference to "continued custody," it is clear that both provisions establish standards that must be satisfied before removing a child from pre-existing custody with a "clear and convincing" standard when the removal is temporary (i.e., for foster care) and a "beyond a reasonable doubt" standard when removal is permanent (i.e., for adoption). Neither provision has

any application when there is no pre-existing custody to continue.

Applying Section 1912(d)'s requirement of remedial services "designed to prevent the breakup of the Indian family" when there is no Indian family to breakup is even more nonsensical. As petitioners explain, Father fails to identify any plausible application of this provision to this case. Pet. Reply Br. 7-9. Remedial consequences only underscore 1912(d)'s inapplicability in the absence of pre-existing custody. The Solicitor General seems to envision that the consequence for failing to offer entirely inapposite rehabilitative programs designed to prevent a breakup is to award Father custody he never had. That is a non sequitur. Section 1912(d) clearly envisions pre-existing custody that will continue unless and until counseling efforts are exhausted. Finally, subsections (d), (e) and (f) all need to be read *in pari materia*, and all three are clearly designed to address the breakup of pre-existing families and the discontinuation of pre-existing custody. They are not designed to *create* parental rights for unwed fathers out of whole cloth where none would otherwise exist.[2] The misfit between Section 1912 and someone like Father, with neither pre-existing custody nor any parental rights

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[2] Father and his amici suggest that ICWA was designed to protect against prejudices that favored the traditional nuclear family over extended families. That is true, but irrelevant. As a result of Father's abandonment, Baby Girl was never part of *any* Indian family, extended or otherwise. To trigger 1912(d), an Indian family need not be nuclear, just *existing*.

apart from ICWA, is highlighted by the implications of Father's argument—that he would receive initial permanent custody without a best interests determination. That is an unprecedented result that runs counter to basic principles of family law, which ensure that a child is in the custody of either birth parents who have not voluntarily relinquished their rights or someone in a position to protect the child's best interests. As long as 1912(d) and (f) apply to pre-existing families and pre-existing custody, it is appropriate to require counseling or a heightened showing of harm before a transfer. But to allow someone like Father who has no pre-existing custody and no parental rights whatsoever to obtain permanent custody based only on the absence of proof beyond a reasonable doubt of an imminent threat to safety would be wholly unprecedented. In this regard, it is telling that where ICWA expressly contemplates the return of a child to an Indian parent after a break in custody (*e.g.*, if adoptive parents terminate their parental rights), the relevant standard is "the best interests of the child." 25 U.S.C. § 1916(a).[3]

Finally, the Tribe suggests that 1915(a) is a trump card that will frustrate this adoption even if Father's 1912 arguments fail. But 1915(a) is

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[3] Congress' express incorporation of the best interests standard in 1916(a) is also a complete answer to the spurious argument that 1912(f)'s extreme standard reflects Congress' view that it is always in a child's best interest to be placed in the custody of an Indian custodian, even when there is no pre-existing custody and no parental rights outside ICWA.

inapplicable here. It applies only to adoptive placements, and gives preferences to (1) the child's extended family; (2) other members of the tribe; or (3) "other Indian families." 25 U.S.C. § 1915. Father's theory, accepted by the Court below, is not that he should be allowed to adopt Baby Girl, but that ICWA gives him an entitlement to custody as the Father. As a consequence, Father was the only potential Indian custodian offered, and he fits into none of the three enumerated categories.

Of course, if 1915(a) were applicable here, its constitutional difficulties would be front and center. Most obviously, 1915(a)(3)'s preference for "other Indian families" from different tribes cannot be understood as anything but a stark racial preference. Indeed, it is telling that the Solicitor General omits 1915(a)(3) from an otherwise comprehensive discussion of 1915(a). Gov't Br. 30-31.

B. The Act's Purposes Establish That Congress Did Not Intend ICWA to Thwart Baby Girl's Adoption

The mismatch between Congress' purposes in enacting ICWA and the application of ICWA to remove Baby Girl from her adoptive home could not be starker. As *Holyfield* observes, ICWA "was the product of rising concern in the mid-1970s over ... abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes." 490 U.S. at 32. But Father's failure to establish a parental relationship with Baby Girl was not the product of any abusive child welfare practices, but his own actions and inactions. Baby Girl's Hispanic mother had sole

custody of Baby Girl and unilateral authority to place her for adoption with petitioners because Father voluntarily abandoned Baby Girl and, under both state law and the Constitution, an unwed biological father's abandonment of his child deprives him of any parental claim to that child, regardless of his race or ancestry. Nothing in the text or purposes of ICWA purports to vest new federal parental rights in someone with no rights whatsoever under state law.

Nor would finalizing Baby Girl's adoption by petitioners remotely implicate the concerns outlined in *Holyfield* regarding the "serious adjustment problems" faced by Indian children raised in "white society." 490 U.S. at 33 & n.1. Due to Father's voluntary relinquishment of rights, petitioners were the only family Baby Girl ever knew and any serious adjustment problems would result from a transfer of custody to Father, even though the statute gives absolutely no consideration to such adjustment problems. *But cf.* 25 U.S.C. § 1916(a).

No one really disputes this; instead they choose to defend the lower court's application of ICWA to Baby Girl primarily on the ground that the custody transfer is consistent with Congress' statement that children are a vital "resource" for ensuring the tribes' continued existence. But that goes to the heart of this case and what distinguishes it from *Holyfield*. It is no mere detail that *Holyfield* involved birth parents and children domiciled on a reservation while this case does not. While the former situation implicates Congress' expressed concerns with the removal of children from Indian families and the depopulation of reservations, nothing in ICWA

supports the rather chilling prospect of gathering in children with a trace of Indian blood but no other connection to the tribe or reservation and transferring them to Indian custody without a best interests determination. Respondents' argument to the contrary "distorts the delicate balance between individual rights and group rights recognized by the ICWA," *Holyfield*, 490 U.S. at 55 (Stevens, J., dissenting), and as discussed next, needlessly puts the Act on a collision course with Baby Girl's constitutional rights.

III. The Lower Court's Interpretation And Application Of ICWA To Remove Baby Girl From Her Adoptive Home Must Be Rejected On Constitutional Avoidance Grounds

This is a classic case for application of constitutional avoidance principles. ICWA generally, and the provisions relied on by the courts below in particular, do not squarely apply where a biological father has neither pre-existing custody nor any parental rights under state law. And the constitutional consequences of the competing interpretations are dramatically different. Under petitioners' view, ICWA accomplishes exactly what Congress declared as its purpose: It establishes "minimum Federal standards for the removal of Indian children from their families." Under the competing view, ICWA engenders all manner of constitutional difficulties: Based on nothing more than her Indian blood quantum, it deprives Baby Girl of her most fundamental liberty interests—and more concretely, the only family she ever knew—without the benefit of a best interests determination or any

other inquiry focused on her interests, as opposed to those of a man who was a physical and legal stranger due to his intentional abandonment of her before her birth.

Those supporting the judgment below suggest that ICWA works only a political classification, and properly interpreted that may be so. But as applied here, ICWA would deprive Baby Girl of fundamental liberty interests based on race and race alone. Respondents would also deny Baby Girl any liberty interest entitled to constitutional protection whatsoever. That cannot be right. Whatever the scope of a child's liberty interest, it surely extends to provide at least some minimal protection before she loses the only family connection she has ever known.

A. The Lower Court's Interpretation and Application of ICWA Violated Baby Girl's Equal Protection Rights

Respondents and the government cannot deny that but for her 3/256th of Cherokee blood, Baby Girl would have been entitled to adoption proceedings focused on *her* best interests. Nonetheless, they defend ICWA as a mere political classification subject only to rational basis review. That argument ignores the text of ICWA, the nature of tribal membership requirements, and the reality that Baby Girl had no connection other than biology to any tribe.

As to text, ICWA does not rely solely on tribal membership or eligibility for membership. Its definition of "Indian child" is expressly based on biology. It includes both tribal members and a child who "is eligible for membership in an Indian tribe

and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (emphasis added). Thus, by its terms, ICWA would not apply to an *adopted* child of an Indian couple who was not yet a tribal member. It is not clear how this can be understood as anything other than a racial classification.

The Tribe's own membership criteria further underscore that eligibility for tribal membership itself functions as a racial proxy: It is racial heritage, and racial heritage alone, that determines eligibility for such membership. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000) ("Ancestry can be a proxy for race. It is that proxy here."). Indeed, a number of tribes, including the Cherokee Nation, automatically deem individuals to be tribal members if they satisfy blood quantum requirements. J.A.35-36 (Baby Girl was "automatically admitted as a member of the Cherokee Nation" for the first 240 days of her life); Navajo Nation Br. 10 ("The Navajo Nation's laws provide automatic membership to individuals—including children—who are at least one-quarter Navajo."). While some people with Indian heritage are excluded from tribal membership because they do not have a sufficient blood quantum to meet a particular tribe's enrollment requirements, "a class defined by ancestry" is not race-neutral simply because it "does not include all members of [the] race." *Rice*, 528 U.S. at 516-17.

Of course, tribal classifications can be political classifications subject to rational basis review, but only when the differential treatment is legitimately tied to tribal self-government. *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). There is thus a critical

difference between a hiring preference limited to the Bureau of Indian Affairs and one that applies government-wide, *id.* at 553-54, and between the application of ICWA's jurisdictional provision in *Holyfield* and ICWA's substantive application here based on nothing beyond biology. And the threshold question—whether a classification is racial or political—is certainly not subject to deferential rational basis review. Racial classifications are far too dangerous for any classification that can rationally be described as a political classification to escape meaningful judicial scrutiny. If a classification does not serve political purposes, then it is not political—it is a racial classification subject to strict scrutiny under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). *See Williams v. Babbitt*, 115 F.3d 657, 664-65 (9th Cir. 1997) (discussing the "logical implications of *Adarand*" for determining whether an Indian preference passes constitutional muster). To hold otherwise would render the Equal Protection Clause meaningless for Baby Girl and others like her: By respondents' account, so long as the differential treatment of Baby Girl by the government is based on her tribal membership—a membership conferred on her automatically based solely on her race—neither she nor anyone else has equal protection rights to invoke.

The key to distinguishing between tribal classifications that operate as political distinctions and those that operate as racial classifications is whether there is a clear link to Indian self-government and sovereignty. Thus, for example, laws that treat Indian lands differently based on the unique implications of Indian land for state

regulatory authority are understood as political classifications, *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979), while those that simply confer advantages on tribes or tribal members more broadly should trigger strict scrutiny, *Williams*, 115 F.3d at 663-65. It is thus one thing for ICWA to protect the jurisdiction of tribal courts or to prevent the removal of children who are domiciled on Indian lands, but quite another for ICWA to impose special disabilities on children with no connection to a tribe beyond biology and to give special benefits to a tribal member who has no parental rights whatsoever outside of ICWA.

Indeed, ICWA itself seems to recognize this distinction as it preserves emergency removal authority for "an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation." 25 U.S.C. § 1922. There is no comparable preservation of authority for children permanently domiciled off the reservation. Congress could not be indifferent to those children. The most logical explanation for this omission is that Congress did not anticipate that ICWA would apply to children, like Baby Girl, who are permanently domiciled off the reservation in the sole custody of a non-Indian mother where the only connection between the child and the tribe is a birth father who has voluntarily relinquished his parental rights.

The lack of any connection between Baby Girl and tribal lands or legitimate interests in sovereignty is glaring. Baby Girl was not enrolled in any Indian tribe by her parents nor was she domiciled on a reservation. Baby Girl did not even have a legally

recognized Indian parent. Having been abandoned by Father before birth, Baby Girl had only one legal parent—a Hispanic single mother who indisputably had sole legal and physical custody of Baby Girl and unilateral parental authority under state law and the Constitution to place Baby Girl for adoption with petitioners. Baby Girl had no political, cultural, or social affiliation with any Indian tribe. She was subjected to differential treatment in her custody proceedings solely because the lower court identified her as having a 3/256th quantum of Cherokee blood that she inherited from Father and that the Tribe deemed sufficient for membership.

Respondents nonetheless perceive a link to concerns about tribal sovereignty because the transfer of Baby Girl's custody to Father served the political purpose of increasing the Tribe's active membership. But it is one thing for Congress to impose minimum requirements for the removal of Indian children from Indian lands or from Indian parents, which appears to be Congress' modest and constitutional intent, and quite another to gather in any child with the slightest percentage of Indian blood, but no other connection to the Tribe. To attempt to convert ICWA from the former into the latter based on the tribes' political interest in augmenting their membership fundamentally skews the balance of individual and group rights. *See supra* pp. 14-15. While tribes are certainly free to set their own membership requirements, the notion that they can assert a political claim mandating that such a child be raised by a tribal member "goes well beyond any reasonable limit," *Rice*, 528 U.S. at 527 (Breyer,

J., concurring), and cannot be squared with the most basic equal protection principles.

B. The Lower Court's Interpretation and Application of ICWA Violated Baby Girl's Fundamental Liberty Interests

The differential treatment inflicted on Baby Girl was not a mere hiring preference or a preference in awarding government contracts. By virtue of her 3/256th Indian blood quantum, Baby Girl was at 27 months old removed from the only parents she had ever known. But for ICWA and her race, Baby Girl's adoption indisputably would have been finalized under state law as consistent with her best interests, and those critical family bonds would have become permanent. Instead, she was transferred to a biological father who—based on his own actions and inactions—was in every sense a physical and legal stranger to her. Other than a short phone call the next day, Father never allowed Baby Girl to speak to her adoptive family again. Nor has Baby Girl had any contact with Mother, as she did via Mother's open adoption arrangement with petitioners. It is hard to imagine a more complete deprivation of the only liberty interests of consequence to a 27-month old child.

Although respondents and the government seek to minimize the constitutional dimension of Baby Girl's loss, they cannot seriously contest that Baby Girl had an "intimate human relationship" with petitioners that falls squarely within the category of relationships this Court has held constitutionally safeguarded from undue government intrusion. *See* Guardian Br. 56-57. While there are certainly

situations in which a child's liberty interest will be subordinated to the parent's liberty interest in determining the child's upbringing, *see Reno v. Flores*, 507 U.S. 292, 304 (1993), that is no basis to deny the existence of a protectable liberty interest in the first place. And here, Father's abandonment of Baby Girl unequivocally deprived him of any constitutionally protected interest in Baby Girl, Guardian Br. 32-41, and Mother fully supported Baby Girl's adoption by petitioners. Thus unless Baby Girl's liberty interest is denied entirely, it was neither subordinate to any parental interest nor adequately protected in the proceedings below.

There are also circumstances where the government may and should interfere with a child's familial relationships as a matter of the child's own welfare. But that does not mean the government is free to intervene without regard to the child's liberty interests. To the contrary, the government's intervention is justified by its responsibility to protect the child's liberty interests, and when the government intervenes, the standard for ensuring that government action promotes rather than undermines those interests—going back to the earliest days of the Republic, Guardian Br. 50—is the best interests standard. Thus, when, as here, a statute is applied to deprive a child of her liberty interests without a best interests determination, it raises a serious constitutional question.

The proceedings below did not begin to account for Baby Girl's best interests. Both lower courts were very clear that, consistent with Father's argument, they believed themselves bound under 1912(f) to

transfer Baby Girl's custody to Father in the absence of evidence beyond a reasonable doubt that he was not likely to inflict "serious emotional or physical damage" to her. Pet App.28a-33a, 122a-123a. It is hard to imagine a standard further removed from the best interests standard. Not only is the focus on Father rather than the child, but his interests are protected by the "beyond a reasonable doubt" standard. Respondents and the government argue improbably that Congress made a global judgment that an Indian child's best interests are served by transfer to an Indian father. But as already noted, *see supra* p. 12, Congress knew how to incorporate the "best interests" standard and did so in the one place it contemplated the possibility of transferring custody to an Indian custodian who did not have pre-existing custody. *See* 25 U.S.C. § 1916(a). And the whole point of the best interests standard is to consider the individualized circumstances of a particular child. A one-size-fits-all federal presumption is no substitute.

Respondents' appeal to the lower court's discussion of Baby Girl's best interests fails for the same reason. As the dissenting justices observed, the majority did not make any effort to determine Baby Girl's individual best interests, but simply declared that as an "Indian child," Baby Girl's best interests were automatically aligned with the interests of Father and the Tribe. Pet.App.28a-37a, 54a-55a. Whatever force this presumption might have when applied to children who have meaningful tribal connections, it flew in the face of Baby Girl's reality and cannot pass constitutional muster.

It is hard to grasp the loss felt by a 27-month-old who abruptly loses her parents. While there will always be circumstances where the removal of a child from her home is unavoidable or necessary, the Constitution surely protects children from the arbitrary infliction of such loss by the government, particularly on the basis of race. Baby Girl was taken from the only parents she had ever known and handed to a legal and physical stranger. In place of a determination focused on Baby Girl and her best interests, the courts below did nothing more than find the absence of evidence beyond a reasonable doubt that serious physical or emotional damage was likely. And the sole reason Baby Girl was singled out for this dramatically unfavorable treatment was a fraction of Indian blood that the Tribe deemed sufficient to assert an interest in having her raised by a tribal member. This tragedy was neither mandated by ICWA nor permitted by the Constitution. To hold otherwise would deem Baby Girl little more than chattel, a "resource" to be gathered up by the Tribe rather than a human being with individual interests and emotional commitments that transcend her racial make-up. ICWA was enacted to stop the unconscionable destruction of tribal communities by child welfare authorities who did not value the families they disintegrated. It should not be construed to sanction the unconscionable destruction of families. The decision below must be reversed.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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April 9, 2013

REPLY BRIEF

No. 12-399

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

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REPLY BRIEF

Father prompted this adoption by abandoning his unborn child and her pregnant mother, leaving Mother solely responsible for deciding whether to abort Baby Girl, raise her in poverty, or place her with an adoptive family. Mother chose the latter, which she had the right to do without Father's permission or involvement under state law and the Constitution. But the court below held that because Mother was impregnated by a tribal member, ICWA entitled Father to veto the adoption and wrench Baby Girl from the adoptive family who had loved and raised her for over two years since birth.

Respondents, the United States, and their amici applaud this result, arguing that any biological child of a tribal member presumptively must be raised by an Indian family. They further argue that blood connections to tribal members trump any other ethnicity or cultural heritage of the child. Their message to non-Indian adoptive parents is to leave abandoned Indian children alone, because tribes and their members control those children's destinies. Further, respondents and their amici falsely assert that Mother and Adoptive Parents improperly concealed their adoptive plans. Neither state law nor ICWA required earlier notice to Father. Father knew from the outset the only relevant fact: Mother was pregnant with his child. Under state law, that knowledge required him immediately to act like a parent. Instead, he shirked his parental responsibilities for over a year, well beyond the generous window of opportunity that state law gives unwed fathers to embrace parenthood.

Father dismisses Mother as someone who "finally and definitely relinquished her interest in Baby Girl,"

and trumpets himself as the "natural parent . who does want to raise the child." Br. 52. Yet Father earlier and definitely repudiated parenthood, telling Mother that Baby Girl was her sole responsibility. Recognizing Father as an ICWA "parent"—despite his utter lack of parental rights under state law or the Constitution—would be unconscionable. ICWA was not intended to create federal parental rights where none otherwise would exist. Respondents' reading of ICWA allows Indian birth fathers to pull a bait-and-switch that Congress cannot have intended. Fathers could eschew all paternal responsibility—thereby prompting the women they impregnate to place their children with adoptive parents—and at the eleventh hour claim their rights as "natural" parents under ICWA to override the rights of the mothers who acted responsibly.

Worst of all is the disgraceful impact on Baby Girl, who, after being abandoned by Father, found a loving, stable home. She represents countless children who deserve a childhood free from the chaos caused by the decision below. She deserves to be treated as a unique, multiethnic individual whose best interests are not inexorably dictated by her blood connection to a tribal member.

A. FATHER IS NOT AN ICWA "PARENT"

Section 1903(9)'s first sentence defines a "parent" as "any biological parent . . . of an Indian child," while the second sentence excludes "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). Because the first sentence encompasses all acknowledged or proven biological fathers, the second sentence excludes unwed fathers with no acknowledged or established parental rights under state law. Pet. Br. 22-23.

Before Adoptive Parents filed this proceeding—triggering ICWA's application—state law excluded Father from being a "parent" who could object to his biological child's adoption. State law did so to protect birth mothers and guarantee children immediate and stable placements. ICWA does not make "parent[s]" of irresponsible unwed fathers whom States decline to recognize as such. Congress did not pass ICWA under the offensive assumption that unwed Indian fathers who abandoned their children need extra time and incentives to reconsider their decision. Rather, Congress had the more modest goal of protecting Indian parents already recognized under state law, including certain unwed fathers, from having their children removed from preexisting custody.

1. Respondents argue that ICWA created a new federal definition of parenthood based on a biological connection alone and that Father's acknowledged and proven biological connection suffices. Father Br. 22, 26-27; U.S. Br. 15-17. Although "federal statutes are generally intended to have uniform nationwide application," *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989), Congress presumptively resorts to state law to define family law terms to avoid usurping States' traditional and exclusive authority in this area. Pet. Br. 20-22. The definition of "parent" falls within the heartland of States' authority over domestic relations. Accordingly, the Court should be particularly reluctant to infer that Congress intended Section 1903(9) as a dramatic encroachment upon State prerogatives that creates federal-law parents who would have no rights under state or constitutional law. That is presumably why the State *amici* caution that "biology may not be enough to

acknowledge or establish paternity under ICWA." Arizona Br. 23 n.14.

Father argues that a federal rule ensures uniformity when adopted children move across state lines. Br. 25-26; U.S. Br. 15-16. But it is implausible that Congress intended to uniformly ensure that delinquent Indian fathers who refuse to support the pregnant mother and child could obtain parental rights without following state law. Congress surely presumed that absentee Indian fathers have the same capacity as absentee non-Indian fathers to comply with state law.

Father contends that the second sentence relieves courts from identifying unwed fathers. Br. 22-23; U.S. Br. 18. But ICWA elsewhere relieves courts of that burden, 25 U.S.C. § 1912(a), leaving the second sentence superfluous under Father's view. Father's reading also assumes Congress intended to confer special privileges on deadbeat dads, sperm donors, or rapists based solely on a biological link. Congress should not be presumed to have placed those men on equal footing with fully committed unwed fathers.

The United States suggests that looking to parental rights under state law would require factual inquiry before notifying potential parents of adoption proceedings. U.S. Br. 19. But States require notice of proceedings to potential fathers even though their consent may be irrelevant. S.C. Code § 63-9-730; *Evans v. S.C. Dep't Social Servs.*, 399 S.E.2d 156, 157 (S.C. 1990). Father thus was notified of the adoption proceeding well before ICWA was invoked. Pet. Br. 10.

Father argues that because he took a DNA test that would satisfy South Carolina "paternity" proce-

dures, he is a "parent" even if ICWA incorporates state law. Br. 26-27 (citing S.C. Code §§ 63-17-10(C), 63-17-30(A)); U.S. Br. 17. As Father recognizes, however, establishing biological paternity is distinct from obtaining parental rights to consent to adoptions. Father Br. 26 & n.9; *cf.* Pet. App. 22a. Father's DNA test did not transform him into a parent with rights to object to an adoption, because he failed to embrace parenthood as state law requires. S.C. Code § 63-9-310(A)(5). Nor can ICWA plausibly be interpreted to disregard state law governing parental adoption rights in favor of incorporating inapposite state law governing proof or acknowledgement of *biological* paternity. ICWA is triggered by *adoption* proceedings and protects parents' *rights* in those proceedings.

2. Father argues that he "asserted his claim to raise his daughter literally the moment he was belatedly informed of the attempted adoption, which never would have gone forward at all had accurate information about Father and Baby Girl been provided to Oklahoma authorities and the Cherokee Nation." Br. 2. But Baby Girl was never "his daughter." She was the child Father abandoned and refused to support unless Mother married him. Pet. App. 2a-4a. Baby Girl to him was a bargaining chip to force Mother's hand. Pet. Br. 6-7; Father Br. 8. And the notion that fathers diligently preserve parental rights so long as they act immediately upon learning of a proposed adoption "fundamentally misconstrue[s] whose timetable is relevant." *Robert O. v. Russell K.*, 604 N.E.2d 99, 103 (N.Y. 1992).

> Promptness is measured in terms of the baby's life not by the onset of the father's awareness. The demand for prompt action by the father at the child's birth is neither arbitrary nor punitive,

> but instead a logical and necessary outgrowth of the State's legitimate interest in the child's need for early permanence and stability.

Id. at 103-04; Pet. Br. 25-27.

Far from "belatedly" notifying Father of the adoption, Mother went beyond what the law requires. States generally do not require birth mothers to notify fathers of their adoptive plans. Pet. Br. 9. Oklahoma, where Mother and Father live, does not even require women to notify men of pregnancy, Okla. Stat. tit. 10 § 7501-1.2(A)(5)-(6), let alone their adoption plans, *id.* § 7503-3.1. And when Mother notified Father of his impending fatherhood, Father responded that he would not parent or otherwise support Baby Girl. Pet. Br. 6-7.

Nor was the Tribe left in the dark. The courtesy letter from Mother's lawyer was exceedingly forthcoming about Baby Girl's upcoming birth, though ICWA does not require birth mothers impregnated by tribal members to inform tribes of adoptive plans. JA 5-6. The Tribe had *seventeen months'* notice of the adoption proceeding; ICWA requires ten *days*. JA 53.

Oklahoma was not deprived of "accurate information" about Baby Girl that would have prevented Adoptive Parents and Baby Girl from traveling to South Carolina. Father Br. 2. Oklahoma approved Baby Girl's transfer to South Carolina after Mother again provided more information than required. Mother disclosed Baby Girl's "Caucasian/Native American Indian/Hispanic" ethnicity on the ICPC form. JA 28. Circling "Hispanic" accurately indicated that Baby Girl is predominantly Hispanic. *Id.* The Oklahoma court's dismissal for lack of jurisdiction over Father's complaint is "law of the case."

Pet. App. 20a. Father has pointedly declined to substantiate how Mother supposedly concealed Baby Girl's Indian ethnicity or Adoptive Parents illegally transferred Baby Girl from Oklahoma. Pet. Br. 9, 10, 12 n.3.

B. SECTIONS 1912(d) AND (f) DO NOT APPLY

Respondents and their amici spill considerable ink arguing that ICWA broadly applies to adoption proceedings involving Indian children. Father Br. 28-37; Cherokee Br. 22-27; U.S. Br. 10-13. But ICWA's general applicability hardly helps Father. Even if Father is an ICWA "parent," no one disputes that he had no right to remove Baby Girl from her adoptive home unless Sections 1912(d) and 1912(f) apply to him. But only custodial parents can invoke those provisions.[1]

1. Section 1912(d) requires that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). Father argues that Section 1912(d) applies because this adoption causes a familial "breakup" in the "ordinary sense" by preventing him and his extended family from raising his biological daughter and by terminating his "legal relationship with his daughter." Br. 43; U.S. Br. 21 (adoption "break[s] his family connection to his daughter").

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[1] The United States suggests that even if Father cannot invoke ICWA, petitioners must terminate his rights under S.C. Code § 63-7-2570. U.S. Br. 26 n.6. Absent relief under ICWA, however, an adoption decree automatically terminates an absentee father's rights. *Hucks v. Dolan*, 343 S.E.2d 613, 615 (S.C. 1986); Pet. App. 21a n.19.

That is not an ordinary reading of the words "breakup of the Indian family," which presuppose the dismantling of a preexisting Indian family. A "breakup" is "[t]he discontinuance of a relationship" that already exists. American Heritage Dictionary 235 (3d ed. 1992); *accord* Father Br. 43. Only a delusional person breaks up with a girlfriend he never had. Defining "the Indian family" to include prospective relationships also conflicts with federal guidelines interpreting Section 1912(d). Remedial services under Section 1912(d) are intended to "alleviate the need to *remove* the Indian child from his or her parents," not to facilitate a *transfer* of the child *to* a biological parent. *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67,592 (Nov. 26, 1979) (emphasis added); *see In re W.B., Jr.*, 281 P.3d 906, 921 n.15 (Cal. 2012); *B.R.T. v. Exec. Dir.*, 391 N.W.2d 594, 600 (N.D. 1986).

Respondents' reading is further undercut by Sections 1912(e) and (f), which, as the United States concedes (Br. 23-25), allow only custodial parents to invoke protections that apply in termination of parental rights and foster care proceedings. Sections 1912(d), (e), and (f) work in tandem, by giving parents access to remedial services under 1912(d) to avoid termination and foster care placement under the standards of Sections 1912(e) and (f). The BIA Guidelines are in accord. 44 Fed. Reg. at 67,592-93.

The illogical consequences of respondents' construction of Section 1912(d) are amply illustrated by the decision below, which held that Adoptive Parents did not satisfy Section 1912(d) because they failed to "stimulate Father's desire to be a parent." Pet. App. 26a. Father and the United States argue that the Tribe, state actors, and adoption agencies should

offer non-custodial fathers remedial services. Father Br. 43; U.S. Br. 22. No one, however, can prevent a "breakup" of a non-existent Indian family. And applying Section 1912(d) to these circumstances would create perverse results. Tribes could effectively veto adoptions by failing to provide services—and the Tribe did nothing to "rehabilitate" Father. States play no active role in private adoptions. Private agencies are unnecessary in some direct-placement adoptions, do not work for free, and may not be controllable by adoptive parents. The ultimate burden would fall on the adoptive parents.

In any event, the only instigator of familial "breakup" here was Father, who already repudiated any "legal relationship" or "family connection" with Baby Girl by abandoning her. There was no "Indian family" to break up, only the loving adoptive family that existed from Baby Girl's first breath. ICWA should not be construed to allow Father to dismantle that family.

2. Father also cannot invoke Section 1912(f), which requires courts, before ordering termination of parental rights, to find that the "continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(f). Section 1912(e) is similarly worded for foster care placements. That language cannot apply to Father, who never had legal or physical custody over Baby Girl. Absent previous custody, courts cannot assess whether the parent's continued custody would seriously harm the child.

Father responds that "continued" has a "prospective meaning" because custody continues into the future and the court must assess future effects on the child's well-being. Br. 41-42. Father is only half-

right. The word "continued" assumes both that a condition previously existed and that it will endure prospectively—which is why even the United States concedes that the state court "assumed the word 'continued' out of the provision." Br. 24-25.

Section 1912(f)'s custodial requirement would not, as Father suggests, exclude parents of children in temporary foster care and divorced parents with visitation rights. Br. 29, 31, 46 n.19. Section 1912(f) is not limited to current custody; it covers all parents with prior custodial relationships. Courts can look to those past relationships when determining whether that parent's continued custody would harm the child. Pet. Br. 33.

Father observes that ICWA defines a "child custody proceeding" to include "termination of parental rights," *i.e.*, "any action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(1)(ii). From that, Father infers that "Congress wanted Section 1912(f) to preclude termination of parental rights in this broad sense absent a showing that continuation of the *parent-child legal relationship* would injure the child." Br. 40. That argument conflicts with Section 1912(f)'s text, which requires that before "termination of parental rights may be ordered," the court must assess the effect on the child of "continued custody" by the parent. The text unambiguously distinguishes between termination of the parent-child relationship and continued custody. Custody does not encompass any parent-child relationship, but means "decision-making authority with respect to the child." S.C. Code Regs. 114-4730(A); Black's Law Dictionary 442 (9th ed. 2009).

Remarkably, Father also argues that his lack of prior custody is a bonus; if courts cannot assess how

his "continued custody" would affect Baby Girl, "[n]o termination of parental rights may be ordered." Br. 39. Congress surely did not confer a free-pass to non-custodial parents, or intend to treat absentee Indian fathers more favorably than Indian parents with preexisting custodial rights. Section 1912(f) applies only to parents for whom courts can make the assessment required by the text.[2]

3. The presumption throughout ICWA that a parent has custodial rights bolsters the inference that Sections 1912(d)-(f) similarly require prior custody. 25 U.S.C. §§ 1913, 1914, 1916, 1920. We do not maintain that these provisions apply here. *Cf.* Father Br. 44. But this Court should assume that Congress passed a coherent statute whose provisions work together. None of these provisions makes sense when applied to non-custodial parents. Pet. Br. 35-39.

Sections 1913(b)-(d) state that "the child shall be returned to the parent" upon a parent's revocation of consent to foster care or adoptive placement, or when consent was procured by fraud or duress. Pet. Br. 37-38. A parent must have a prior custodial relationship for the child to be *returned* to him. Compact Oxford English Dictionary 2525 (1971) ("return" means "to come or go back to a place or person"). Father misquotes the statute as providing that the child will be

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[2] Father observes that a Senate Committee report rejected a proposal to limit ICWA to cases where "at least one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe." H.R. 3286, § 301 (1996); Father Br. 36-37. Even assuming that post-enactment legislative inaction illuminates congressional intent, *Bruesewitz v. Wyeth*, 131 S. Ct. 1068, 1092-93 (2011), Section 1912(f)'s unambiguous text requires a custodial parent.

"*restored* to the parent" and argues that upon a parent's revocation of consent, Congress contemplated that "the status quo ante (whatever that was) will be restored." Br. 44. But the quoted language is not in the statute, and Father's view would produce the absurd result that when Father withdrew his consent to the adoption, Baby Girl was "restored" to a condition of abandonment.

Section 1914 allows a collateral attack of a proceeding by "any parent or Indian custodian from whose *custody* such child was *removed*." Father argues that "from whose custody such child was removed" modifies "Indian custodian" but not "parent." Br. 45. But "Indian custodian" already incorporates a custodial relationship. 25 U.S.C. § 1903(6). And Congress throughout ICWA equates Indian custodians with custodial parents, confirming the two are indistinguishable. 25 U.S.C. §§ 1912(e), 1912(f), 1916(a), 1916(b), 1920.

Section 1916(a) refers to "return of custody." Father suggests that reference "is best understood as offering an opportunity to restore parental rights and gain legal custody," Br. 45, but that reads "return" out of the statute. Father had no custodial rights to restore. Section 1916(b), which Father ignores, refers to "where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed." Pet. Br. 37. That language is similarly nonsensical when applied to Father, who has no child who can be "returned" to him. And Section 1920 refers to "improper removal of child from custody," "return of child," "a petitioner who has improperly removed the child from custody of the parent or Indian custodian" and the state of

"returning the child to his parent or custodian." In short, custodial references permeate ICWA.

4. Respondents argue that *Holyfield* implicitly held that ICWA does not require a preexisting Indian family because the twins in that case were not "in the custody of Indian parents at the time of the child custody proceeding." Father Br. 35; Cherokee Br. 26-27. But the "sole issue" in *Holyfield* was tribal jurisdiction, 490 U.S. at 42, not the construction of Sections 1912(d), (e), or (f). In any event, *Holyfield* involved a preexisting Indian family that would have continued but for the adoption.

C. SECTION 1915(a) DOES NOT APPLY

1. Section 1915(a) provides for preferential adoptive placement of a child with the child's extended family, another member of the child's tribe, or any other Indian family. Although the provision applies to "any" child custody proceeding, in context that means any proceeding where there is a preference to apply. *Cf. Nixon v. Missouri Mun. League*, 541 U.S. 125, 132-33 (2004). But here, there was no preference to apply because only petitioners sought to adopt Baby Girl. The United States does not argue otherwise. U.S. Br. 14 n.2. There was also no alternative placement with respect to which a court could make a "good cause" determination. The court below thus compared Adoptive Parents to *Father* in finding the exception inapplicable, even though Father did not seek to adopt Baby Girl and he was not covered by Section 1915(a).

It is irrelevant that Baby Girl's paternal grandmother could have asserted rights under Section 1915(a). Father Br. 48-49; Cherokee Br. 21-22. She did not. Nor did any of the Tribe's "100 certified

adoptive homes" offer to adopt Baby Girl. Cherokee Br. 22. The Tribe's suggestion that a remand would be proper to let them now step forward invites further chaos and heartbreak in this and future proceedings. All children deserve swift resolution of placement determinations, and Indian children should not wait in limbo while tribes scramble to execute Plan B. "[A] child would lose precious months when she could have been []adjusting to life" in her permanent home. *Chafin v. Chafin*, 133 S. Ct. 1017, 1027 (2013).

Respondents also argue that Section 1915(a) is not properly before the Court. Father Br. 47; Cherokee Br. 15. The petition, however, disputed the application of Section 1915(a) (Pet. 15 n.2; Pet. Reply 7), and the division of authority with respect to the existing Indian family doctrine encompasses the application of Section 1915(a) in cases like this. Pet. Br. 52 (citing *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at *16-17 (Tenn. Ct. App. Nov. 19, 1997)).[3]

2. The state court held that Adoptive Parents did not meet their supposed burden to conduct a diligent search for families meeting the preference criteria.

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[3] As the Tribe observes (Br. 21 n.9), petitioners' counsel stated below that Section 1915 applied if Father could not invoke ICWA and that the "good cause" exception was satisfied here. At the petition stage, petitioners argued that Section 1915(a) was inapplicable because no one stepped forward under Section 1915. Pet. 15 n.2; Pet. Reply 7. Petitioners' merits brief reasserted that contention. Pet. Br. 51-57. Although Baby Girl's placement with petitioners undoubtedly would establish "good cause" if the provision applies, as a threshold matter Section 1915(a) requires a preferred party to petition for custody so that a child's placement can be determined at once.

Pet. App. 38a.[4] The Tribe advocates a regime in which they are puppet-masters who control the lives of pregnant women bearing "their" children and prospective adoptive parents whom ICWA presumes are unfit to raise "their" children. Cherokee Br. 10, 43. But ICWA is not a federal mandate to form new Indian families or to conscript other families' children to *grow* Indian families. Pet. Br. 52. The Tribe states "that is precisely what Section 1915(a) *does* command." Br. 20; Father Br. 48 (same). Respondents tout Section 1915(a)'s "good cause" exception but simultaneously defend the decision below that rejected petitioner's reliance on the fact that Baby Girl was raised for over two years by the adoptive parents Mother hand-selected. Cherokee Br. 18-19; Father Br. 47; Pet. App. 38-39 & n.31. If Section 1915(a)'s "good cause" exception is not met here, it is hard to imagine where it would be. The grave constitutional concerns with this reading counsel in favor of construing Section 1915 either to apply only when a preferred party seeks custody or to require placement with Adoptive Parents under the "good cause" exception.

D. THE CANON OF CONSTITUTIONAL AVOIDANCE APPLIES

ICWA's text, history, and purpose reflect Congress's intent to protect existing Indian families. The interpretation below turned ICWA on its head by holding that biological fathers may invoke ICWA to

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[4] The United States notes that the BIA guidelines advise adoption agencies to timely notify a child's extended family members and tribe that they are subject to a preference. Br. 14 n.2. The United States does not specify the consequences of non-compliance, the meaning of timeliness, or what happens without an adoption agency.

veto a birth mother's adoptive choices, and that tribes presumptively control children who are eligible for tribal membership based on their race. That interpretation carries disturbing and far-reaching implications. The victims include petitioners, who welcomed Baby Girl into their family after Father abandoned her and after Mother made a profound child-rearing choice. The victims include Mother, who was manipulated by Father's change of heart. And finally, they include Baby Girl, whose life was tragically disrupted by Father's change of heart and who is being claimed by all tribes as their own based on her genetic make-up.

1. Applying ICWA beyond preexisting Indian families raises far more equal protection issues than respondents or the United States recognize. Treating Baby Girl as a font of special preferences solely because of her Indian heritage does not merely treat her differently from all non-Indian adoptees. Under respondents' view, Baby Girl's Indian blood automatically upgrades Father to an ICWA "parent" with a veto over Baby Girl's adoption, a right that no delinquent unwed father of a non-Indian child could claim. Baby Girl's Indian blood further gives Indian families of *any* tribe an absolute preference in adopting her over any non-Indian families, including petitioners.[5]

At minimum, these preferences are of dubious constitutionality. This Court has long identified "furthering Indian self-government" as the only constitu-

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[5] The United States argues (Br. 28) that petitioners fail to identify the subject of a race-based distinction. ICWA discriminates on account of the child's race. Tax breaks to parents of Asian children would be unconstitutional even though the benefit would not turn on the parent's race.

tionally legitimate justification for preferences based on tribal affiliation. *Morton v. Mancari*, 417 U.S. 535, 550 (1974); *Rice v. Cayetano*, 528 U.S. 495, 519 (2000). Such preferences reflect "the unique status of Indians as 'a separate people' with their own political institutions." *United States v. Antelope*, 430 U.S. 641, 646 (1977). The narrow scope of that interest is obvious. Indian *self*-government refers to tribal members' involvement in the tribe's own internal affairs, *Mancari*, 417 U.S. at 554, including the operation of tribal courts, *Fisher v. District Court*, 424 U.S. 382 (1975) (per curiam), taxation, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), and regulation of Indian land and culture, *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997).

Extending ICWA's preferences to Indian children who were never part of an Indian family advances none of these aspects of Indian self-government. While tribal children are undoubtedly vital to tribes, Father Br. 49-50, Cherokee Br. 35-36, Baby Girl was not part of the Tribe, and treating her otherwise ignores the fundamental difference between keeping Indian children already within Indian communities and wrenching them from their existing non-Indian homes. Interpreting ICWA to prevent children within a tribal community from leaving and "break[ing] up . . . the Indian family" regulates the internal domestic relations of tribal members. Using ICWA to claim children from non-Indian families instead controls the rights of non-Indian parents and adoptive couples in perhaps the most sensitive area of governmental regulation. "[E]fforts by a tribe to regulate non-members, especially on non-Indian fee land, are 'presumptively invalid'" and self-evidently do not constitute self-government. *Plains Commerce Bank v.*

Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). Expanding the concept of self-government to encompass the decision below would allow Congress to ban interracial adoption of *any* Indian child—notwithstanding the child's best interests, her parents' adoptive choices, other aspects of the child's ethnic or racial heritage, or even whether the adoptive Indian parents belonged to an entirely different Indian tribe from the child. *See* 25 U.S.C. § 1915(a)(3). ICWA should be read to avoid such a constitutionally questionable result.

Nor are ICWA's tribal preferences incidents of political self-governance merely because ICWA is triggered by tribal membership. Father Br. 49-50. Undoubtedly, defining eligibility for tribal membership furthers Indian self-government. *Id.* at 50-51. ICWA, however, is concerned with the *consequences* of tribal membership. Under respondents' reading, tribal membership allows the Tribe to dictate who may parent an "Indian child" and how that child should be raised—issues far afield from the core concerns of Indian political institutions. If any tribal preference in any sphere could be rendered constitutional through the expedient of conditioning the preference on tribal membership, the limits established by *Mancari* and *Rice* would be meaningless. Because the whole point of a tribal preference is to benefit tribal members, it is difficult to imagine *any* tribal preference that would not condition eligibility for the preference on membership. And it is equally hard to imagine any preference that would not therefore be immune from scrutiny under respondents' theory.

Stripped of any veneer of self-government, applying ICWA on these facts implements a naked racial pref-

erence. Although respondents disclaim any relationship between tribal membership and race, Cherokee Br. 32-34, ancestry is the *only* requirement for membership in many tribes, including the Cherokee Nation. Pet. Br. 44-45 & n.5. Eligibility for membership here is a "proxy for race." *Rice*, 528 U.S. at 514. And if there were any doubt, Cherokee law automatically enrolls any direct descendent of an original Dawes enrollee as a tribal member for the first 240 days of the child's life. JA 36. The Tribe recently represented that this law binds this Court in applying ICWA—and thus dictates adoptive placement based solely on blood connection, even if *neither* parent is a tribal member. Petition for a Writ of Certiorari at 7-8, *Cherokee Nation v. Ketchum*, 132 S. Ct. 2429 (2012) (No. 11-680); *cf.* Cherokee Br. 38. That is a disturbing proposition.

2. The decision below unnecessarily threatens birth mothers' fundamental right to determine how their children will be raised.[6]

A woman's constitutional right to control her child's destiny does not evaporate when she decides to pursue adoption for her unborn child. Mother, as Baby Girl's sole and unquestionably fit parent under state law, had a "fundamental right to make decisions concerning the care, custody, and control" of her child. *Troxel v. Granville*, 530 U.S. 57, 60 (2000) (plurality op.). That plainly encompasses the "recognized constitutional right to select adoptive parents for her child." *M.L. v. Superior Court*, 90 Cal. Rptr. 920, 927 (Cal. Ct. App. 2009); *Y.H. v. F.L.H.*, 784 So.

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[6] Contrary to the United States' contention (Br. 31), petitioners have "standing" to assert Mother's liberty interest under the canon of constitutional doubt. Pet. Br. 43.

2d 565, 571-72 (Fla. Dist. Ct. App. 2001). The United States correctly but irrelevantly observes that the Constitution does not endow birth mothers with an inalienable right "to have [their] child adopted." U.S. Br. 32 (quoting *Does 1, 2, 3, 4, 5, 6, & 7 v. State*, 993 P.2d 822, 836 (Or. Ct. App. 1999)). Nor does the Constitution guarantee mothers that their children will have friends or access to private schools. But the Constitution certainly gives mothers the right to choose who may associate with their children, *Troxel*, 530 U.S. at 60, and which school will educate them, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

It can hardly be maintained that the Constitution gives a mother no say whatsoever over the profound decision as to which prospective adoptive couple will raise her child to adulthood, inculcate her religion and values, and involve the mother in the child's life as she grows. The United States notes that adoption is not subject to a mother's "unilateral control over the outcome." U.S. Br. 32. States undoubtedly can insist that a mother's adoptive choice further her child's best interest. But the accommodation of multiple perspectives hardly justifies extinguishing a birth mother's role in the most momentous decision for her and her child's future. The Constitution gives mothers a voice, if not an outright veto.

Respondents' construction of ICWA tramples this liberty interest and penalizes women for bearing Indian children and choosing the adoptive couple who will raise them. Respondents erroneously portray Mother as having signed away all rights to determine Baby Girl's fate the moment she agreed to the adoption—leaving the door open for Father to unilaterally unwind Baby Girl's adoption through ICWA.

Father Br. 52; Cherokee Br. 47.[7] That view converts the exercise of a constitutional right into an invitation for a bait-and-switch. Worse, this case vividly illustrates how ICWA can be wielded as a threat to circumscribe mothers' choices yet further. Mother was told that she could either raise Baby Girl as an impoverished single parent—or that Father, backed by ICWA's preference scheme, would block Mother's chosen adoptive couple from raising Baby Girl. Respondents' view shamefully signals to vulnerable mothers of Indian children that their fundamental reproductive and parenting choices are in the hands of men and tribes. To believe that ICWA was intended to express congressional hostility towards vulnerable women and solicitude towards absentee fathers and their tribes is highly dubious. More dubious is congressional interference with a mother's choice between abortion, single parenthood, and adoptive placement with a loving couple who embraces open adoptions. Most dubious of all is that Congress required non-Indian sole-custodial mothers to obtain tribal permission before they secure a bright, stable future for their children.

3. The decision below raises serious federalism concerns by creating ICWA-only "parent[s]" with no rights under state law, and by supplanting States' best-interest determinations in adoption proceedings with a presumption that Indians alone should adopt Indian children. Father dismisses those concerns as an inconsequential incident of Congress's "plenary and exclusive" authority over Indian affairs. Br. 51

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[7] Mother's rights have not been terminated because the adoption was never finalized. Further, Mother consented to an adoption *by Adoptive Parents*. She certainly did not relinquish her rights to Father.

(quoting *United States v. Lara*, 541 U.S. 193, 200 (2004)). That authority is plenary, however, with respect to Congress's ability to adjust the boundaries of Tribes' authority as *dependent* sovereigns. *Lara*, 541 U.S. at 203-04. That authority affords no license to rewrite the powers of independent sovereign States. *Id.* at 205.

When States' traditional regulatory powers run headlong into core elements of tribal self-government—*e.g.*, taxation, criminal law, and education—Congress may compel state law to give way. Cherokee Br. 53. Congress can arguably even alter the calculus States apply to adoptions if ordinary state procedures risk breaking up existing Indian families. But Congress cannot extend to tribes the power to dictate the lives of non-Indian parents and adoptive couples. States, not tribes, ordinarily govern non-Indian individuals' rights. States, not tribes, ultimately bear responsibility for abandoned children within their borders, whatever their heritage. And unlike tribal members, non-Indian parents and non-Indian adoptive couples never consented to tribal governance. Judge Wald correctly warned that the federal interest under such circumstances is "so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power" in custody disputes. H.R. Rep. No. 95-1386, at 40 (1978).

* * *

That petitioners have not seen their daughter in over a year is a tragedy, not a reason to affirm the flawed decision below. Father Br. 53. Future tragedies can be averted if unwed fathers are not permitted to abandon Indian children with impunity and to upend the lives of birth mothers, adoptive

parents, and children. Reversal will leave ICWA as Congress intended, protecting tribal families and their tribes. All the future requires is that unwed Indian fathers—like all other fathers—appreciate that their choices have consequences and that some decisions cannot be undone. Too much is at stake for the children involved to demand any less.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether the South Carolina courts properly applied the Indian Child Welfare Act of 1978, 25 U.S.C. 1901 *et seq.*, to award custody of an Indian child to her biological father over an adoptive couple, where the father acknowledged and established his paternity and no remedial measures had been taken to avoid termination of his parental rights.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case involves the scope and application of the Indian Child Welfare Act of 1978, 25 U.S.C. 1901 *et seq.* (ICWA). The United States has a substantial interest in the case because Congress enacted ICWA in furtherance of "the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people." 25 U.S.C. 1901; see 25 U.S.C. 1901(3) (discussing the United States' "direct interest, as trustee"). ICWA authorizes the Secretary of the Interior to make grants for Indian child and family service programs; see 25 U.S.C. 1931-1932; 25 C.F.R. Pt. 23, and the Bureau of Indian Affairs (BIA) issued non-binding guidelines in 1979 addressing state courts' implementation of ICWA, 44 Fed. Reg. 67,584.

STATEMENT

1. In enacting ICWA in 1978, Congress determined that federal action was necessary to address "the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 32 (1989). In particular, Congress made express statutory findings that "an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies," and that the States "ha[d] often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(4) and (5). ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 1386, 95th Cong., 2d Sess. 23 (1978) (House Report)).

ICWA applies to a "child custody proceeding" that involves an "Indian child," defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. 1903(4). A "child custody proceeding" is defined as including any action for "foster care placement," "termination of parental rights," "preadoptive placement," or "adoptive placement." 25 U.S.C. 1903(1).

ICWA establishes certain minimum standards for child custody proceedings in state courts. Both the

Indian child's "parent" and her Tribe are entitled to notice of such proceedings; the parent, if indigent, is entitled to court-appointed counsel; and the Tribe may intervene. 25 U.S.C. 1911(c), 1912(a) and (b). ICWA defines a "parent" as "any biological parent or parents of an Indian child," but provides that the term "does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. 1903(9).

A voluntary relinquishment of parental rights is not valid unless consent is given in writing before a court of competent jurisdiction; no purported consent to relinquishment given before or within 10 days after the child's birth is valid, and any voluntary relinquishment may be withdrawn for any reason before parental rights are formally terminated. 25 U.S.C. 1913(a) and (c). "Any party seeking" an involuntary termination of parental rights under state law must satisfy the court that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." 25 U.S.C. 1912(d). In addition, a state court may not involuntarily terminate parental rights "in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. 1912(f).

When determining an adoptive placement of an Indian child, ICWA requires that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. 1915(a).

2. a. This case involves a child, Baby Girl, who was born on September 15, 2009. Her father is a registered member of the Cherokee Nation and her mother is non-Indian. Pet. App. 2a. Mother and Father became engaged in December 2008, and Mother informed Father that she was pregnant in January 2009. *Id.* at 2a-3a. Mother lived in Bartlesville, Oklahoma, while Father, actively serving in the United States Army, was stationed four hours away at Fort Sill. *Id.* at 2a-3a. After learning of the pregnancy, Father asked Mother to move up the wedding date and declined to provide any financial support until after the couple was married. *Id.* at 3a. The couple's relationship deteriorated over the following months, and Mother broke off the engagement in May 2009. *Ibid.*

In June 2009, "Mother sent a text message to Father asking if he would rather pay child support or surrender his parental rights. Father responded via text message that he would relinquish his rights." Pet. App. 4a. The parents had no further contact during the pregnancy or for several months after Baby Girl was born, and Father did not provide financial support to Mother. *Ibid.*

During the pregnancy, Mother, without informing Father, decided to place the child for adoption. Pet. App. 4a. Working through a private adoption agency, Mother selected petitioners, who live in South Carolina, as the adoptive parents. *Id.* at 5a. Petitioners attended the birth, and Mother signed forms relinquishing her parental rights and consenting to the adoption. *Id.* at 7a. Petitioners initiated adoption proceedings in South Carolina on September 18, 2009, and returned there with Baby Girl. *Id.* at 7a-8a.

Father first learned that Baby Girl was placed for adoption almost four months later, on January 6, 2010,

when he was served with legal documents concerning the adoption proceeding. Pet. App. 7a-8a. The next day, Father contacted a lawyer, and he subsequently requested a stay of the adoption proceedings. *Id.* at 9a. Father deployed to Iraq on January 18, 2010, and did not return to the United States until December 2010. *Id.* at 9a & n.11.

In April 2010, the Cherokee Nation intervened in the South Carolina action. Pet. App. 10a. In May 2010, Father's paternity was established by the South Carolina family court through DNA testing, and Father answered petitioners' amended complaint, stating that he did not consent to the adoption. *Ibid.*

b. On November 25, 2011, the family court denied petitioners' adoption petition and awarded custody to Father. Record on Appeal (ROA) 6-28.

The family court concluded that the case was governed by ICWA because it was a "child custody proceeding" involving an "Indian Child," as those terms are defined in the statute. ROA 18-19. Moreover, the court concluded that Father was a "parent" under the statute "because he has both acknowledged paternity and paternity has been conclusively established in this action through DNA testing." ROA 19.

The family court observed that, under South Carolina law, the consent of an unwed father to an adoption is not necessary if he did not either live openly with the biological mother for at least six months before the placement or financially support the child or the mother during the pregnancy. ROA 16 (citing S.C. Code Ann. § 63-9-310(A)(5)). But the court explained that "ICWA extends greater rights to the unwed Indian father." ROA 19. The court determined that Father had not voluntarily

consented to the adoption in accordance with ICWA's requirements. ROA 21 (citing 25 U.S.C. 1913).

The family court found that there were no state-law grounds for terminating Father's parental rights. ROA 22-24. The court also found that it had not been shown that custody of Baby Girl by Father was likely to result in serious emotional or physical damage to the child. ROA 24, 26. The court noted that "[t]here is no evidence to suggest that he would be anything other than an excellent parent to [Baby Girl]." ROA 25.[1]

Petitioners transferred Baby Girl to Father on December 31, 2011, and he travelled with her back to Oklahoma. Pet. App. 11a.

c. With two justices dissenting, the South Carolina Supreme Court affirmed. Pet. App. 1a-100a. Like the family court, the supreme court concluded that ICWA applies to this case because it is a child custody proceeding involving an Indian child. *Id.* at 13a, 20a n.18. The supreme court also concluded that Father is a "parent" within the meaning of ICWA. *Id.* at 20a-22a; accord *id.* at 58a (dissent), because Father had "both acknowledge[ed] his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establish[ed] his paternity through DNA testing." *Id.* at 22a.

The supreme court concluded that Father's parental rights should not be involuntarily terminated for two independent reasons. Pet. App. 25a-33a. First, the court noted that ICWA required as a predicate to such termination a finding that "active efforts have been made to provide remedial services and rehabilitative

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[1] The family court briefly discussed ICWA's preventive-measures provision, ROA 15 (citing 25 U.S.C. 1912(d)), but did not base its custody determination on it.

programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Id.* at 26a (quoting 25 U.S.C. 1912(d)). Yet petitioners "admit[ed] that the provision had not been satisfied." *Ibid.*

Second, the supreme court held that termination of Father's parental rights was separately barred by 25 U.S.C. 1912(f) because petitioners did not show that his "custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt." Pet. App. 29a. The court acknowledged that separating Baby Girl from petitioners would "cause some degree of pain," but it concluded "that Father desires to be a parent to Baby Girl, and that he and his family have created a safe, loving, and appropriate home for her." *Id.* at 32a.

Having concluded that Father's parental rights should not be terminated, the supreme court concluded that it would be in the "best interest of the child" for custody to be granted to Father. Pet. App. 34a-37a. The court observed that, consistent with the statutory policy behind ICWA, Baby Girl "has a strong interest in retaining ties to her cultural heritage" as an Indian child. *Id.* at 35a; see *id.* at 35a n.28 (noting that the record "establishes that Father's family has a deeply embedded relationship with the Cherokee Nation"). In addition, petitioners failed to "present[] evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family." *Id.* at 37a.

Finally, the court noted that "even if [it] were to terminate Father's rights," ICWA's adoption placement preferences would still apply. Pet. App. 37a (citing 25 U.S.C. 1915(a)).

SUMMARY OF ARGUMENT

The South Carolina courts properly awarded custody of Baby Girl to Father.

A. ICWA applies to any "child custody proceeding" involving an "Indian child." 25 U.S.C. 1903(1) and (4). It is uncontested that those two predicates are satisfied here. ICWA thus governs, with each of its provisions then applying (or not) according to its particular requirements.

Petitioners advocate a judicially-invented exemption to ICWA that would render it categorically inapplicable when a court believes the statute's protections are unnecessary to protect an "existing Indian family." ICWA's plain language forecloses any such exemption, and vague appeals to statutory purpose cannot surmount that barrier. In any event, by focusing exclusively on an interest in preserving preexisting nuclear families, the purported exemption ignores Congress's emphases on both the importance of extended families in Indian culture and the profound interests of Indian Tribes in preventing loss of their children.

B. The South Carolina Supreme Court correctly determined that Father is a "parent" under ICWA. Through his state court filings and DNA testing, Father "established" and "acknowledged" paternity under both a plain-language reading of ICWA's definition of "parent" (25 U.S.C. 1903(9)) and under the relevant provisions of state law governing paternity. Petitioners' arguments to the contrary incorrectly confuse rules governing establishment of paternity and those governing consent to adoption, which play no role in ICWA's definition of "parent."

C. The South Carolina Supreme Court correctly concluded that Father's parental rights could not be termi-

nated because no remedial efforts had been taken to avoid that outcome. 25 U.S.C. 1912(d). ICWA requires such efforts, as well as a finding that they were unsuccessful, before parental rights may be terminated. Although petitioners seek to excuse the failure by pointing to Father's supposed lack of "interest in parenthood" (Pet. Br. 31), the family court found that he had amply demonstrated such an interest through the course of this litigation, even without the required remedial services. ROA 23, 25.

D. Because the judgment below may be affirmed on the basis of Section 1912(d) alone, the Court need not address the South Carolina Supreme Court's separate conclusion that Section 1912(f) also barred termination of Father's parental rights. If the Court does address that question, however, it should conclude that the state court misinterpreted the provision. Section 1912(f) requires that, in order to terminate "parental rights," there be a showing "beyond a reasonable doubt" that the "*continued custody* of the child by the parent * * * is likely to result in serious emotional or physical damage to the child." 25 U.S.C. 1912(f) (emphasis added). Continued custody is a predicate to application of this provision, and the South Carolina Supreme Court erred by not determining whether Father in the past had physical or legal custody sufficient to trigger the provision.

E. Application of ICWA to this case presents no constitutional concerns. Congress has plenary authority over Indian affairs, and it permissibly used that authority to protect against state laws and procedures that were improperly separating Indian children from Indian communities, thus eroding Tribes' viability. Application of ICWA presents no equal-protection issue because the distinctions it draws are not racial but political—based

on membership or eligibility for membership in sovereign Indian Tribes. Finally, ICWA, which is predicated on Congress's considered judgment that application of its protections serves the best interests of Indian children and protects vital interests of their parents and Tribes, does not violate any substantive due process protections.

ARGUMENT

THE SOUTH CAROLINA COURTS PROPERLY AWARDED CUSTODY TO FATHER

The proceeding below was a "child custody proceeding" involving an "Indian child," and Father is a "parent" who "acknowledged" and "established" his paternity. 25 U.S.C. 1903(1), (4) and (9). ICWA therefore governs, and Father's parental rights could not be terminated absent showings that "preventive measures" had been taken to avoid that outcome and that they had proven unsuccessful. 25 U.S.C. 1912(d). Neither showing was made in this case, so the South Carolina courts correctly declined to terminate Father's parental rights.

A. ICWA Applies To This Child Custody Proceeding

1. It is undisputed that Baby Girl is an "Indian child" for purposes of ICWA: she is "under age eighteen," "is eligible for membership in an Indian tribe," and "is the biological child of a member of an Indian tribe." 25 U.S.C. 1903(4). It is also undisputed that Baby Girl is the subject of a "child custody proceeding," as the case involves both "termination of parental rights" and "adoptive placement." 25 U.S.C. 1903(1). ICWA thus plainly governs this case.

2. Notwithstanding this straightforward textual command to apply ICWA, petitioners argue for a judicially-created "existing Indian family" doctrine that

would render ICWA categorically inapplicable "[w]hen an adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian mother with sole custodial rights." Br. 39; see *id.* at 39-42.

As petitioners have acknowledged, the large majority of States have rejected the "existing Indian family" doctrine, Pet. 11-12; see Br. in Opp. 16-18, and it was unanimously rejected by the South Carolina Supreme Court in this case, Pet. App. 17a-18a n.17; accord *id.* at 55a n.46 (dissent). Indeed, the Kansas Supreme Court, which first created this extra-textual exception to ICWA, *In re Adoption Baby Boy L.*, 643 P.2d 168, 175 (1982), later abandoned it, both because it is "at odds with the clear language of ICWA, which makes no [such] exception," and because the exception is contrary to the statute's core purpose of safeguarding "tribal interests in preservation of their most precious resource, their children." *In re A.J.S.*, 204 P.3d 543, 549 (2009).

That rejection of the "existing Indian family" doctrine is correct. As explained above, ICWA applies to *any* child custody proceeding involving an Indian child. And where Congress intended a categorical exemption, it provided one expressly. Congress thus excepted from the definition of a "child custody proceeding" "an award, in a divorce proceeding, of custody to one of the parents" and also a "placement" resulting from a juvenile delinquency proceeding. 25 U.S.C. 1903(1). It provided no such exception for cases that, in a family court's view, do not involve an "existing Indian family." See *Elgin* v. *Department of Treasury*, 132 S. Ct. 2126, 2135 (2012) (where Congress expressly provides one exception but not another, it "indicates that Congress intended no such exception.").

Petitioners contend (Br. 35-39) that several provisions in ICWA "apply only to parents who have a preexisting custodial relationship with an Indian child." Even if petitioners were correct about those particular provisions, it would not follow that the statute is *categorically* inapplicable absent preexisting custody. To the contrary, the plain language of those provisions dictates the scope of their applicability, and conditions on the applicability of some provisions should not indiscriminately be imported into others.

Vague appeals to statutory purpose likewise provide no basis for an extra-textual, categorical exception to ICWA. Even if the Court believed that the Congress that enacted ICWA focused on removal of children from conventionally-defined nuclear families, that would not provide license "to rewrite the statute so that it covers only what [the Court] think[s] is necessary to achieve what [it] think[s] Congress really intended." *Lewis* v. *City of Chicago*, 130 S. Ct. 2191, 2200 (2010); see *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

In any event, as this Court has explained, Congress "was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 49 (1989); see 25 U.S.C. 1901(3) (congressional finding "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children"). Congress furthered this purpose by according Tribes "numerous prerogatives * * * through the ICWA's substantive provisions * * * as a means of protecting not only the interests of individual Indian children and

families, but also of the tribes themselves." *Holyfield*, 490 U.S. at 49 (citing 25 U.S.C. 1911(a), (b) and (c); 1912(a); 1914; 1915(c) and (e); 1919). The notion that ICWA is altogether inapplicable when in the court's view there is not an "existing Indian family" is directly contrary to that core statutory purpose. *In re A.J.S.*, 204 P.3d at 550-551.

Congress also enacted ICWA against the backdrop of its understanding of "the dynamics of Indian extended families," which play a central role in Indian child-rearing, and its determination that state courts had badly "misunderstood" that dynamic. House Report 10; see 25 U.S.C. 1903(2), 1915(a)(1). The "existing Indian family" doctrine—under which ICWA applies only when a child would be separated from a nuclear Indian family—is contrary to that understanding, because it results in the separation of Indian children from their extended kinship and tribal networks.

The "existing Indian family" doctrine is particularly problematic because, as sometimes applied in the lower courts, it requires assessment of the "Indianness" of a particular parent or child. *In re A.J.S.*, 204 P.3d at 551 (citation omitted). That is a determination courts "are ill-equipped to make," and reliance on it both "frustrates" ICWA's purpose to "curtail state authorities from making child custody determinations based on misconceptions of Indian family life," *id.* at 551 (citation omitted), and encroaches on the power of Tribes to define their own rules of membership, *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 55 (1978). Understandably, petitioners disclaim reliance on this mode of analysis. Pet. Br. 40-41.

3. For substantially the same reasons, petitioners' attempt (Br. 52-54) to impose a non-textual limitation on

ICWA's placement preferences fails. Those preferences apply in "*any* adoptive placement of an Indian child," 25 U.S.C. 1915(a) (emphasis added), and there is no reference in the provision to a "preexisting Indian family," Pet. Br. 52. Indeed, those preferences are manifestly not about keeping Indian children with their parents; they come into play only when "parental rights of the Indian parent ha[ve] already been terminated." House Report 23. The placement preferences, "[t]he most important substantive requirement imposed on state courts," *Holyfield*, 390 U.S. at 36, reflect the "[f]ederal policy that, where possible, an Indian child should remain in the Indian community," House Report 23. That policy holds whether or not, prior to the adoptive placement, there was a "preexisting Indian family" (Pet. Br. 52) in the narrow sense contemplated by petitioners.[2]

B. Father Is A "Parent" Under ICWA

Petitioners argue (Br. 19-29) that Father could not invoke ICWA's protections because he is not a "parent" as the statute defines that term—"any biological parent * * * of an Indian child," with the exception of "the

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[2] Petitioners' asserted practical objections to application of the placement preferences under the circumstances of this case, see Br. 52-53, are beside the point because, as explained below, the South Carolina courts properly awarded custody to Father, so the preferences did not come into play. In any event, as the BIA guidelines explain (see p. 1, *supra*), family courts and adoption agencies should timely "notify the child's extended family and the Indian child's tribe that their members will be given preference in the adoption decision." 44 Fed. Reg. at 67,594. The burden thus need not fall on "mothers and adoptive parents." Pet. Br. 53. In addition, Section 1915(a) includes a "good cause" safety-valve for deviating from the preferences, and the preferences should "not * * * be read as precluding the placement of an Indian child with a non-Indian family," House Report 23, when that good cause standard is satisfied.

unwed father where paternity has not been acknowledged or established," 25 U.S.C. 1903(9). In particular, petitioners contend (Br. 24) that ICWA's definition of "parent" should be understood to "exclude[] unwed fathers who have no parental rights under state law," and they posit that Father had no such rights under South Carolina law. This contention, which was rejected by both the majority and dissent below, Pet. App. 20a-22a, 58a, is mistaken for two independent reasons.

1. First, there is no indication in ICWA that Congress intended to incorporate an entire body of state law into the definition of "parent." In fact, *Holyfield*, which interpreted the term "domicile" in ICWA, cuts strongly against such a reading. The Court there began "with the general assumption that in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law," because "federal statutes are generally intended to have uniform nationwide application," and there is a "danger that the federal program would be impaired if state law were to control." 490 U.S. at 43-44 (quotation marks and citation omitted).

The Court in *Holyfield* concluded that "the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary." 490 U.S. at 44. A central objective of the statute is to safeguard "the rights of Indian families and Indian communities vis-à-vis state authorities," and "Congress could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of domicile." *Id.* at 45. The Court also noted that "[w]here Congress did intend that ICWA terms be defined by reference to other than federal law,

it stated this explicitly." *Id.* at 47 n.22 (citing 25 U.S.C. 1903(2) and (6)).

The case for a uniform federal definition of "parent" under ICWA is, if anything, stronger, than for "domicile" in *Holyfield*. ICWA includes no definition of "domicile," *Holyfield*, 490 U.S. at 43, thus leaving it to the courts to define the term. But ICWA does expressly define "parent," 25 U.S.C. 1903(9), and "statutory definitions control the meaning of statutory words . . . in the usual case," *Burgess* v. *United States*, 553 U.S. 124, 129-130 (2008) (citation omitted).

The Court in *Holyfield* further explained that "a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind." 490 U.S. at 46. So too here: Congress cannot have intended an individual's status as a "parent" to vary if his child is taken from one State to another.

As several state courts have held, all that an unwed father must do as a matter of federal law under ICWA to qualify as a "parent" (if he has not already been confirmed as such) is to take reasonable steps to establish or acknowledge paternity. *Bruce L.* v. *W.E.*, 247 P.3d 966, 978-979 (Alaska 2011) (collecting cases); compare *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 59 (2001) (addressing methods for U.S. citizen father to "acknowledge[]" or "establish[]" paternity under 8 U.S.C. 1409(a)(4) so as to render child a citizen); *Astrue* v. *Capato*, 132 S. Ct. 2021, 2028 (2012) (same under 42 U.S.C. 416(h)(3)(C)(i) for Social Security benefits). In this case, Father has taken such steps by acknowledging his paternity in this case and by establishing paternity through DNA testing. ROA 19; Pet. App. 22a.

2. Even if Congress intended for courts to look to state law in deciding the specific question whether an unwed father has "acknowledged or established" paternity under 25 U.S.C. 1903(9), Father complied with relevant state law here.

Petitioners contend that the relevant state law is that pertaining to consent to adoption (Br. 26 (citing S.C. Code Ann. § 63-9-310(A)(5)), but, as the South Carolina Supreme Court itself explained, that contention "collapse[s] the notions of paternity and consent." Pet. App. 22a. Distinct state laws address the specific subject of how an unwed father's "paternity" may be "acknowledged or established" (25 U.S.C. 1903(9)). *E.g.*, S.C. Code Ann. § 63-17-10(C) ("action to establish the paternity of an individual"); *id.* § 63-17-50 ("verified voluntary acknowledgement of paternity").

Indeed, just a few years before ICWA, Congress had enacted legislation requiring States participating in the Aid to Families with Dependent Children Program to adopt child-support programs that would, among other things, "establish the paternity" of certain beneficiary children "born out of wedlock." Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2354. Congress used a similar phrase here—excluding from the definition of "parent" an "unwed father where paternity has not been acknowledged or established," 25 U.S.C. 1903(9)—and there is no indication Congress intended this language to embody an entirely different concept concerning consent to adoption.

3. Petitioners contend (Br. 22-23) that "[b]ecause the first sentence [of the statutory definition of parent] already covers an unwed father whose biological link is acknowledged or established, the canon against superfluity counsels reading the second sentence to require

more than a proven biological connection." Petitioners' premise is incorrect: the first sentence includes no acknowledgement or establishment requirement. It covers *any* "biological parent" (or adoptive parent). 25 U.S.C. 1903(9). The second sentence then excludes from that definition an "unwed father where paternity has not been acknowledged or established." *Ibid.* Because the status of a person as a "parent" triggers procedural rights from the outset of the case (see 25 U.S.C. 1912(a) and (b) (right to notice, intervention, and counsel)), the second sentence serves to relieve the court in an involuntary termination proceeding of the burden of affirmatively identifying a father where paternity has not already been acknowledged or established and the steps required by 25 U.S.C. 1912(a) fail to identify the father within the time provided.[3]

4. The House Report states that the exception to the definition of "parent" for an "unwed father where paternity has not been acknowledged or established," 25 U.S.C. 1903(9), was "not meant to conflict with the decision of the Supreme Court in *Stanley* v. *Illinois*, 405 U.S. 645 (1972)," House Report 21. Petitioners suggest (Br. 27) that this statement supports the notion that Congress "made a conscious decision not to disturb * * * the State's inherent police power to limit an unwed father's rights when he has not formed a relationship with his child." That assertion is entirely unsupported. *Stanley* found unconstitutional a state dependency statute providing categorically that "an unwed father is not a 'parent.'" 405 U.S. 650; see *id.* at 657-658.

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[3] Of course, paternity of an Indian child may be acknowledged or established after the proceedings have convened, as occurred in this case, and the father thereby attains the status of "parent" for purposes of further proceedings.

The House Report simply makes clear that Congress intended no categorical exclusion of unwed fathers from the definition of "parent" under the statute (which would have conflicted with *Stanley*); such fathers can be parents so long as their paternity is acknowledged or established.

5. Finally, petitioners' contention that ICWA's definition of "parent" should be limited to those unwed fathers with a state-law right to object to an adoption would render other provisions of the statute unworkable. For example, under petitioners' construction, even an individual whose paternity has been formally acknowledged or established before the adoption proceedings commenced would not be entitled to the most basic protections of notice and opportunity to be heard (which are afforded to "parents") if he did not *also* satisfy the state-law requirements for a father whose affirmative consent is required for the adoption.

Moreover, a father's right to object (*i.e.*, withhold his consent) to an adoption under state law could often turn on disputed factual questions, such as whether (or how long) he lived with the mother and whether (or to what degree) he financially supported her during the pregnancy. S.C. Code Ann. § 63-9-310(A). In this case, for example, Father contended (unsuccessfully) that he had standing to object to the adoption even under state law because he attempted to provide financial support to Mother but was rebuffed. ROA 20-21. In petitioners' view, resolution of such questions would determine whether a father is even a "parent" entitled to notice and counsel at the outset. Congress plainly did not contemplate a fact-intensive analysis at the threshold of whether that status was satisfied.

C. Section 1912(d) Barred Termination Of Father's Parental Rights

Given that ICWA applies to this case and Father is a "parent," the question becomes whether his parental rights could be terminated. The South Carolina Supreme Court correctly held they could not because ICWA's "preventive measures" provision was not satisfied. Pet. App. 26a-27a.

That provision requires that, before parental rights can be terminated involuntarily, "active efforts" must be made to rehabilitate the parent. 25 U.S.C. 1912(d). At the time of ICWA's enactment, "most State laws require[d] public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings." House Report 22. Yet such measures were "rarely" taken. *Ibid.* Accordingly, Congress decided to "impose[] a Federal requirement in that regard with respect to Indian children and families." *Ibid.*

As Congress recognized, such a requirement is hardly novel. South Carolina law itself requires efforts to "rehabilitate [a] parent" even in "extreme cases" of a parent "consciously refus[ing] to support, visit, or otherwise make a suitable environment for their child." Pet. App. 27a n.23; see generally 4 Sandra Morgan Little, *Child Custody and Visitation Law and Practice* § 28.02[1][b] (2008) (noting that courts will typically not terminate parental rights if a child welfare agency has not made "reasonable efforts" to avoid that outcome by "strengthen[ing] and encourag[ing] family relations"); 42 U.S.C. 671(a)(15)(B) (requiring States receiving federal payments for foster care and adoption assistance to make "reasonable efforts * * * to preserve and reunify families" before foster placements and "to make it pos-

sible for a child to safely return to the child's home"); *Santosky* v. *Kramer*, 455 U.S. 745, 748-749, 762 (1982).

1. By its plain terms, Section 1912(d) applies to all proceedings involving termination of parental rights to, or foster care placement of, an Indian child under state law. Two mandatory predicates must be satisfied: that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" and "that these efforts have proved unsuccessful." 25 U.S.C. 1912(d). In this case, neither showing was made. Pet. App. 26a. Accordingly, the South Carolina Supreme Court correctly concluded that Father's parental rights could not be terminated.

Petitioners contend (Br. 30) that Section 1912(d) is inapplicable because "there is no 'Indian family' that includes the father to break up." But one of the objects of the adoption proceeding was to terminate Father's parental rights, thereby breaking his family connection to his daughter. In addition, petitioners' contention reflects a misunderstanding of the nature of the broader "Indian family" contemplated by ICWA and the preventive measures provision. ICWA embodies an understanding of family that extends as far as second cousins, or even further at election of a Tribe. 25 U.S.C. 1903(2); cf. *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 504-505 (1977) (plurality opinion) (discussing "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family" than its "nuclear" form).

ICWA's legislative history pointed out that "the dynamics of Indian extended families are largely misunderstood" by state authorities, and that "[a]n Indian child may have scores of, perhaps more than a hundred,

relatives who are counted as close, responsible members of the family" and who may properly supervise Indian children. House Report 10. In addition to Father, Baby Girl has at least two paternal grandparents (and perhaps other relatives) who are statutorily defined as part of her "extended family." 25 U.S.C. 1903(2). A termination of Father's parental rights could break up that broader Indian family as well.[4]

2. Petitioners suggest (Br. 31) it would be "perverse" to place the obligation of pursuing remedial measures on prospective adoptive parents. But the statute places only the burden of demonstrating that such measures have been pursued on "[a]ny party" seeking to terminate parental rights. 25 U.S.C. 1912(d). The task of actually making such efforts need not fall on that party, as the provision requires only that active efforts "have been made," *ibid.*, by someone—*e.g.*, the Tribe, a state agency, or a private adoption agency. House Report 22 (citing state-law requirements for public agencies or "private agencies involved in child placements" to provide remedial services); Pet. App. 26a n.22 (Cherokee Nation could have provided such services in this case).

3. Petitioners seemingly suggest (Br. 31) that the failure to pursue efforts to spur or strengthen Father's interest in assuming custody of Baby Girl can be excused because they would have been futile after he failed

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[4] The summary of this provision in the BIA guidelines, issued in 1979 to offer BIA's interpretation of ICWA's provisions, see 44 Fed. Reg. at 67,584, refers to efforts "to alleviate the need to remove the Indian child from his or her parents." *Id.* at 67,592. The guidelines' accompanying commentary suggests a focus beyond situations in which a parent previously had custody, stating that "it is clear that Congress meant a situation in which the family is unable or unwilling to raise the child in a manner that is not likely to endanger the child's emotional or physical health." *Ibid.*

to "demonstrate[] an interest in parenthood." Yet, "despite some early indications of possible lack of interest in Baby Girl," Father "not only reversed course at an early point but has maintained that course despite * * * active opposition" from petitioners. Pet. App. 27a. Upon learning that Baby Girl had been transferred to South Carolina for adoption, "he immediately instituted legal proceedings to gain custody"; "paid large sums of money in attorney fees"; began escrowing child support upon his return from Iraq, even though not required to do so; and successfully demonstrated that he is a "loving and devoted father" to his other daughter. ROA 23, 25.

Finally, involuntarily termination of Father's parental rights on the theory that his failure to support Mother during her pregnancy constituted consent cannot be reconciled with ICWA's voluntary termination provision. No consent before birth (or within 10 days after birth) is valid, 25 U.S.C. 1913(a); any consent after that time must be executed in a statutorily-prescribed manner, *ibid.*; and consent may be withdrawn "for any reason at any time" before entry of a final decree of adoption or termination of parental rights, 25 U.S.C. 1913(c). Father's pre-birth conduct therefore cannot constitute consent and, even if it could, he effectively withdrew it by seeking custody of Baby Girl.

D. The South Carolina Supreme Court Misinterpreted Section 1912(f)

The judgment of the South Carolina Supreme Court should be affirmed on the ground that the failure to comply with Section 1912(d) barred termination of Father's parental rights. Pet. App. 26a-27a. That court's subsequent discussion of Section 1912(f) as an additional bar to termination of Father's parental rights (*id.* at

28a-33a) was therefore unnecessary, and the Court need not address it. If, however, the Court does reach that question, it should conclude that the South Carolina court's application of that provision was erroneous.

1. Section 1912(f) requires that, in order to terminate "parental rights," there must be a showing "beyond a reasonable doubt" that the "*continued custody* of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. 1912(f) (emphasis added); see also 25 U.S.C. 1912(e) (no foster placement permitted absent finding by clear and convincing evidence "that the continued custody of the child by the parent * * * is likely to result in serious emotional or physical damage").

The state court failed to recognize that this provision is triggered only when a court is able to make a finding about "*continued* custody," which means there must have been some form of custody in the past that could be "continued." *Webster's Third New International Dictionary* 493 (1966) (defining "continued" as "stretching out in time or space" or "resumed after interruption").[5] While the South Carolina Supreme Court was able to determine that Father's "*prospective* legal and physical custody" would not result in "serious damage to the Indian child," Pet. App. 32a (emphasis added), that analysis assumed the word "continued" out of the provi-

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[5] The BIA guidelines, see note 4, *supra*, summarize the standards of evidence under Section 1912(f) in a manner that parallels the statutory text. See 44 Fed. Reg. at 67,592. The guidelines' accompanying commentary, while not specifically opining on the words "continued custody" or stating that it addresses all possible scenarios, explains Section 1912(f) in a manner that is consistent with the requirement of some prior custody, stating that it must be shown "that it is dangerous for the child to remain with his or her present custodians." *Id.* at 67,593.

sion. Cf. *Babbitt* v. *Sweet Home Chapter of Communities for Greater Or.*, 515 U.S. 687, 698 (1995) (noting the Court's "reluctance to treat statutory terms as surplusage").

This Court has observed that Section 1912(f)'s beyond-a-reasonable-doubt standard is an unusually demanding one to apply in a proceeding for termination of parental rights. *Santosky*, 455 U.S. at 769. There is no reason to think that Congress intended to extend that heightened protection beyond the circumstance described in the provision itself, *i.e.*, where the parent has already had some form of custody that would be maintained or restored after an interruption (*e.g.*, after a period of foster care).

2. The previous "custody" required to trigger Section 1912(f) can be either "physical" or "legal" custody. *E.g.*, *D.J.* v. *P.C.*, 36 P.3d 663, 670 (Alaska 2001). That conclusion is supported by ICWA's definition of "Indian custodian" to include an Indian person who has "legal custody" and, alternatively, one who has been given temporary "physical [] custody" by a parent. 25 U.S.C. 1903(6). In Section 1912(f), Congress used just the word "custody," but there is no reason to doubt it intended to encompass both legal and physical forms. Congress surely did not contemplate that a parent with prior legal, but not physical, custody (for example because of an overseas military deployment) would lose the protections of this provision.

Whether a parent had physical or legal custody is determined by relevant state law or tribal law (or custom), as the case may be. ICWA's definition of an "Indian custodian" in Section 1903(6) is again illustrative. It provides that "legal custody" for purposes of that defini-

tion should be determined by looking to "tribal law or custom or under State law." 25 U.S.C. 1903(6).

3. The South Carolina Supreme Court never determined whether Father previously had any form of legal custody. Cf. Pet. Br. 33 & n.4. In the absence of any determination that he did, the court should not have applied Section 1912(f).

Contrary to petitioners' suggestion (Br. 35), however, ICWA is not rendered inapplicable in its entirety by the unavailability of Section 1912(f) to Father. As noted above, ICWA continues to govern because this is a child custody proceeding involving an Indian child. Other provisions, such as Section 1912(d) and the placement preferences in Section 1915(a) (neither of which require "continued custody"), would thus apply.[6]

E. Application Of ICWA In This Case Presents No Constitutional Concerns

Petitioners and respondent Guardian Ad Litem (GAL) contend that the South Carolina Supreme Court's application of ICWA in this case raises constitutional concerns. They are mistaken.

1. ICWA does not unconstitutionally "upset the federal-state balance." Pet. Br. 49. The Constitution vests Congress with "plenary power over Indian affairs." *Alaska* v. *Native Vill. of Venetie Tribal Gov't*, 522

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[6] In the absence of entitlement to the heightened protections of Section 1912(f) (and assuming compliance with Section 1912(d)), state law governing termination of parental rights would govern. *E.g.*, S.C. Code Ann. § 63-7-2570 (Supp. 2012) (enumerating grounds for termination of parental rights); *Richland Cnty. Dept. of Soc. Servs.* v. *Earles*, 496 S.E.2d 864, 868 (S.C. 1998) (clear and convincing standard). The family court found that no state-law ground for termination was present here, ROA 22-24, but the South Carolina Supreme Court did not reach that question, Pet. App. 33a.

U.S. 520, 531 n.6 (1998); see *United States* v. *Lara*, 541 U.S. 193, 200-202 (2004); *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). The Indian Commerce Clause, Art. I, § 8, Cl. 3, expressly provides Congress with the power to "regulate Commerce with * * * the Indian Tribes." In addition, the Court has explained, the "existence of federal power to regulate and protect the Indians and their property" is also implicit in the structure of the Constitution and the duty of protection that arose from the United States' past relationship with Indian Tribes. *Board of Cnty. Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943); see *Lara*, 541 U.S. at 201-202. Thus, as the congressional findings set forth in ICWA state, "Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources." 25 U.S.C. 1901(2). As Congress further found, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," and "the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. 1901(3).

ICWA was predicated on Congress's express finding that States, "exercising their recognized jurisdiction over Indian child custody proceedings," "ha[d] often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. 1901(5); see House Report 10-11. As a result, a disproportionate number of Indian children were separated from the Indian community and "placed in non-Indian foster and adoptive homes." 25 U.S.C. 1901(4); see *Holyfield*, 490 U.S. at 33. "[I]t is [thus] clear that Congress ha[d] full

power to enact laws to protect and preserve the future and integrity of Indian tribes by providing minimal safeguards with respect to State proceedings for Indian child custody." House Report 17.

2. Petitioners contend (Br. 47) that application of ICWA raises equal protection concerns where it "confers an Indian preference" in circumstances "[w]here the father has neither preexisting custodial rights over the child nor a state law right to contest an adoptive placement." Petitioners are incorrect.

As an initial matter, petitioners fail to articulate what purportedly race-based distinction in ICWA might run afoul of equal protection principles. They suggest (Pet. Br. 46) that their concern is with "preferential right[s]" bestowed on "noncustodial fathers," but one's status as a noncustodial father is not race-based. And both biological "parents" of Indian children—whether Indian or not—have parallel rights under ICWA. 25 U.S.C. 1903(9) (definition of "parent").

Respondent GAL suggests (Br. 55) that the relevant distinction is between Indian children as defined by ICWA and other children. But that distinction is "political rather than racial in nature" and thus not subject to heightened equal-protection scrutiny. *Mancari*, 417 U.S. at 553 n.24 (rejecting equal-protection challenge to BIA Indian-hiring preferences). The definition of "Indian child" does not comprise all children who are ethnically Indian, but rather only those who are members of federally recognized Tribes or are eligible for membership and have a biological parent who is a member of such a Tribe. 25 U.S.C. 1903(4) and (8); see *Mancari*, 417 U.S. at 553 n.24 ("The preference is not directed towards a 'racial' group consisting of 'Indians';

instead, it applies only to members of 'federally recognized' tribes.").[7]

This Court has long upheld such "legislation that singles out Indians for particular and special treatment." *Mancari*, 417 U.S. at 554-555. "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. And where the distinction is "reasonable and rationally designed to further Indian self-government," the Court will not conclude "that Congress' classification violates due process." *Ibid.*

Here, the rational relationship test is readily satisfied. Control over matters of tribal membership and domestic relations have consistently been regarded as at the core of tribal sovereignty and self-determination. *Santa Clara Pueblo*, 436 U.S. at 55-56. Congress expressly found in ICWA that Indian children are "vital to the continued existence and integrity of Indian tribes" as political, self-governing entities. 25 U.S.C. 1901(3); see 25 U.S.C. 1902 (ICWA serves "the policy of this Nation to * * * promote the stability and security of Indian tribes"). ICWA is tailored closely to that interest by requiring that an Indian child, in order to be covered by the Act, must herself be a tribal member or eligible for membership through a parent who also is a member,

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[7] Federal law generally prohibits discrimination in adoptive or foster placements based on "race, color, or national origin," 42 U.S.C. 1996b(1), but provides that this prohibition "shall not be construed to affect the application of [ICWA]." 42 U.S.C. 1996b(3). That Congress phrased this qualification as a rule of construction, not an exception, reinforces the conclusion that it reasonably views ICWA as drawing political, not racial, distinctions.

thereby advancing the transmittal of the tribal polity to the next generation.

As *Holyfield* recognized, ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." 490 U.S. at 32. The testimony before Congress placed "considerable emphasis on the impact on the tribes themselves of the massive removal of their children." *Id.* at 34.

ICWA thus furthers one of the most critical sovereign interests of federally recognized Tribes—preventing their slow demise through loss of their children. *Holyfield*, 490 U.S. at 52-53 ("The protection of this tribal interest is at the core of [] ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.") (citation omitted). The Court in *Holyfield* interpreted ICWA to safeguard that interest even in a case where *both* biological parents sought to circumvent it. *Id.* at 50. The case for ICWA's application here, where the biological father, a member of the Cherokee Nation, wishes to raise his child as a member of the Nation, is even stronger.

The placement preferences in ICWA Section 1915(a) present no separate equal protection issue. Cf. Pet. Br. 54. The preference for "a member of the child's extended family" (25 U.S.C. 1915(a)(1)) is plainly not racial and is consistent with generally applicable federal adoption policy. See 42 U.S.C. 671(a)(19). And the preference for "other members of the Indian child's tribe" (25 U.S.C.

1915(a)(2)) is a political classification for the same reasons status as an "Indian child" is.[8]

3. Nor does ICWA as applied by the South Carolina courts violate substantive due process. Cf. Pet. Br. 47-49. Under this Court's "established method of substantive-due-process analysis," a party asserting such a right must offer a "careful description of the asserted fundamental liberty interest" and demonstrate that it is "deeply rooted in this Nation's history and tradition." *Washington* v. *Glucksberg*, 521 U.S. 702, 720-722 (1997) (internal citations and quotation marks omitted). Neither petitioners nor respondent GAL even attempt to make this demanding showing.

Petitioners contend (Br. 48) that ICWA as applied here unconstitutionally impinges on "a sole-custodial mother's decision to place her child in an adoptive home." Mother is not a party to this case, however, and petitioners do not explain why they have standing to assert any constitutional claim on her behalf. *Kowalski* v. *Tesmer*, 543 U.S. 125, 129-134 (2004). In any event, petitioners cite no authority for a substantive due process right in a parent to make an unfettered selection of someone to adopt her child, especially to the exclusion of the child's other biological parent who is actively seek-

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[8] The preference is similar to the rule that applies in intercountry adoptions under the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, art. 4, May 29, 1993. See S. Treaty Doc. No. 51, 105th Cong., 2d Sess. (1998), 1870 U.N.T.S. 167 (intercountry adoptions permissible only "after possibilities for placement of the child within the State of origin have been given due consideration"); 42 U.S.C. 14932(a)(1)(B)(i) (implementing that principle for adoptions involving emigration of child from United States to foreign country); 22 C.F.R. 96.54. That analogy underscores that the distinctions ICWA draws are political ones based on tribal membership and sovereignty.

ing custody. *Does 1, 2, 3, 4, 5, 6, & 7* v. *State*, 993 P.2d 822, 836 (Or. Ct. App. 1999) ("[A] birth mother has no fundamental right to have her child adopted."). An adoption involves relinquishment of parental rights, and it may be effectuated only with "the active oversight and approval of the state." *Ibid.* When a parent avails herself of that state process she may not claim unilateral control over its outcome.

Nor does application of ICWA violate any substantive due process right possessed by Baby Girl. Application of ICWA did not, for example, result in her placement in an unsafe home, or invade any recognized liberty interest. ROA 25 (family court's observation that "undisputed testimony" was that Father "is a loving and devoted father").

Respondent GAL contends that application of ICWA unconstitutionally deprived Baby Girl of an "inquiry focused on her best interests." GAL Br. 58; see *id.* at 49-53. But ICWA reflects Congress's judgment that adherence to its requirements *does* "protect the best interests of Indian children," 25 U.S.C. 1902. Moreover, the family court found that there was no "conflict" between Father's parental rights and the best interests of Baby Girl in this case, ROA 26, and the South Carolina Supreme Court concluded that her best interests supported her placement with Father, Pet. App. 33a-37a. In all events, this Court has declined to constitutionalize the "best interests of the child" standard, pointing out that the standard often must give way to other interests, "[s]o long as certain minimum requirements of child care are met." *Reno* v. *Flores*, 507 U.S. 292, 304 (1993).

Respondent GAL also contends (Br. 57) that the family court violated Baby Girl's substantive due process rights by removing her "from the only 'intimate

human relationships' she had ever known." But this Court has never held that "a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship." *Michael H.* v. *Gerald D.*, 491 U.S. 110, 130 (1989) (plurality opinion); see *Dawson* v. *Public Employees' Ret. Ass'n*, 664 P.2d 702, 708 (Colo. 1983) ("In no sense, therefore, can it be argued that the child's choice as to a custodial parent amounts to a fundamental constitutional right."). And while it was undoubtedly difficult for Baby Girl to be removed from petitioners' custody, GAL Br. 56, their prior custody of her could not ripen through mere passage of time into a constitutional liberty interest on her part in remaining in their care. *Holyfield*, 490 U.S. at 54 ("[T]he law cannot be applied so as automatically to reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.") (internal quotation marks omitted).

CONCLUSION

The judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted.

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MARCH 2013

APPENDIX

1. 25 U.S.C. 1901 provides:

Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes[1]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high

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[1] So in original. Probably should be capitalized.

percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

2. 25 U.S.C. 1902 provides:

Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

3. 25 U.S.C. 1903 provides:

Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child;

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

4. 25 U.S.C. 1911 provides:

Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving

an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, rec-

ords, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

5. 25 U.S.C. 1912 provides:

Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation

In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

(c) Examination of reports or other documents

Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) Foster care placement orders; evidence; determination of damage to child

No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

6. 25 U.S.C. 1913 provides:

Parental rights; voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by

the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the

court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

7. 25 U.S.C. 1914 provies:

Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

8. 25 U.S.C. 1915 provides:

Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other

members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the

agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

9. 25 U.S.C. 1916 provides:

Return of custody

(a) Petition; best interests of child

Notwithstanding State law to the contrary, whenever a final decree of adoption of an Indian child has been vacated or set aside or the adoptive parents voluntarily consent to the termination of their parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody and the court shall grant such petition unless there is a showing, in a proceeding subject to the provisions of section 1912 of this title, that such return of custody is not in the best interests of the child.

(b) Removal from foster care home; placement procedure

Whenever an Indian child is removed from a foster care home or institution for the purpose of further foster care, preadoptive, or adoptive placement, such placement shall be in accordance with the provisions of this chapter, except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed.

10. 25 U.S.C. 1917 provides:

Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

11. 25 U.S.C. 1918 provides:

Reassumption of jurisdiction over child custody proceedings

(a) Petition; suitable plan; approval by Secretary

Any Indian tribe which became subject to State jurisdiction pursuant to the provisions of the Act of August 15, 1953 (67 Stat. 588), as amended by title IV of the Act of April 11, 1968 (82 Stat. 73, 78), or pursuant to any other Federal law, may reassume jurisdiction over child custody proceedings. Before any Indian tribe may reassume jurisdiction over Indian child custody proceedings, such tribe shall present to the Secretary for approval a petition to reassume such jurisdiction which includes a suitable plan to exercise such jurisdiction.

(b) Criteria applicable to consideration by Secretary; partial retrocession

(1) In considering the petition and feasibility of the plan of a tribe under subsection (a) of this section, the Secretary may consider, among other things:

(i) whether or not the tribe maintains a membership roll or alternative provision for clearly identifying the persons who will be affected by the reassumption of jurisdiction by the tribe;

(ii) the size of the reservation or former reservation area which will be affected by retrocession and reassumption of jurisdiction by the tribe;

(iii) the population base of the tribe, or distribution of the population in homogeneous communities or geographic areas; and

(iv) the feasibility of the plan in cases of multitribal occupation of a single reservation or geographic area.

(2) In those cases where the Secretary determines that the jurisdictional provisions of section 1911(a) of this title are not feasible, he is authorized to accept partial retrocession which will enable tribes to exercise referral jurisdiction as provided in section 1911(b) of this title, or, where appropriate, will allow them to exercise exclusive jurisdiction as provided in section 1911(a) of this title over limited community or geographic areas without regard for the reservation status of the area affected.

(c) Approval of petition; publication in Federal Register; notice; reassumption period; correction of causes for disapproval

If the Secretary approves any petition under subsection (a) of this section, the Secretary shall publish notice of such approval in the Federal Register and shall notify the affected State or States of such approval. The Indian tribe concerned shall reassume jurisdiction sixty days after publication in the Federal Register of notice of approval. If the Secretary disapproves any petition under subsection (a) of this section, the Secretary shall provide such technical assistance as may be necessary to enable the tribe to correct any deficiency which the Secretary identified as a cause for disapproval.

(d) Pending actions or proceedings unaffected

Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction, except as may be provided pursuant to any agreement under section 1919 of this title.

12. 25 U.S.C. 1919 provides:

Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child

custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreements may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

13. 25 U.S.C. 1920 provides:

Improper removal of child from custody; declination of jurisdiction; forthwith return of child: danger exception

Where any petitioner in an Indian child custody proceeding before a State court has improperly removed the child from custody of the parent or Indian custodian or has improperly retained custody after a visit or other temporary relinquishment of custody, the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian unless returning the child to his parent or custodian would subject the child to a substantial and immediate danger or threat of such danger.

14. 25 U.S.C. 1921 provides:

Higher State or Federal standard applicable to protect rights of parent or Indian custodian of Indian child

In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard.

15. 25 U.S.C. 1922 provides:

Emergency removal or placement of child; termination; appropriate action

Nothing in this subchapter shall be construed to prevent the emergency removal of an Indian child who is a resident of or is domiciled on a reservation, but temporarily located off the reservation, from his parent or Indian custodian or the emergency placement of such child in a foster home or institution, under applicable State law, in order to prevent imminent physical damage or harm to the child. The State authority, official, or agency involved shall insure that the emergency removal or placement terminates immediately when such removal or placement is no longer necessary to prevent imminent physical damage or harm to the child and shall expeditiously initiate a child custody proceeding subject to the provisions of this subchapter, transfer the child to the jurisdiction of the appropriate

Indian tribe, or restore the child to the parent or Indian custodian, as may be appropriate.

16. 25 U.S.C. 1923 provides:

Effective date

None of the provisions of this subchapter, except sections 1911(a), 1918, and 1919 of this title, shall affect a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement which was initiated or completed prior to one hundred and eighty days after November 8, 1978, but shall apply to any subsequent proceeding in the same matter or subsequent proceedings affecting the custody or placement of the same child.

AMICUS CURIAE BRIEF

No. 12-399

MAR 2 6 2013

CLERK

In The

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF THE HONORABLE ABBY ABINANTI, CHIEF JUSTICE OF THE YUROK TRIBAL COURT AS AMICA CURIAE IN SUPPORT OF RESPONDENT BIRTH FATHER AND RESPONDENT CHEROKEE NATION

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INTEREST OF THE AMICA CURIAE[1]

The interest of the Amica Curiae in this case is the protection of the children of tribal nations within the borders of the United States. This Amica Curiae is an enrolled member of the Yurok Tribe who is the Chief Justice of the Yurok Tribe.[2] She was reportedly the first California Tribal woman to become a member of the State Bar of California and when appointed by the San Francisco Superior Court as a Commissioner in 1994, became the first California Tribal person to serve as a California judicial officer. Her assignment during her seventeen-year tenure with the San Francisco Superior Court was the United Family Law Division where her primary calendars were dependency and delinquency. She is the only tribal person to practice law in the dependency courts of California before and after passage of the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963. Prior to the passage of the ICWA, she represented tribal parents, and after the passage of the ICWA, she also represented Tribes.

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[1] Pursuant to Supreme Court Rule 37.6, amica affirms that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the amica made such a monetary contribution. All parties have consented to the filing of this brief through letters of consent on file with this Court.

[2] The largest tribe in California.

This Amica has studied and is familiar with the legal history and relationships of tribal people and the invaders who came to call themselves Californians, and she is a student of the constantly changing area of law designated Indian Law, Federal/State/Tribal. She brings to her work the responsibilities of a Yurok adult who is now an elder in a world renewal culture[3] that presupposes the obligation to protect the values of the family/village/Tribe and their world.

That obligation requires that the stories/knowledge of the time before ICWA be set forth for the consideration of the Court that will decide for the Yurok nation our relationship to our children who have suffered when parents/guardians have been overcome with the problems of sorrow and fail to meet their parental responsibilities. It is not only for Yuroks and Yurok families that the Court will decide, the Court decides for all tribal nations. While not able to speak for all Nations, the Chief Judge is not relieved of the responsibility to try to protect all. She is required to tell the story so that all may know that even if we try and fail, we did not fail to try.

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[3] "We are a world renewal people. We are here to heal and renew the earth for everyone, not just Yurok people. That is our obligation." Chris Peters, Yurok Ceremonial Leader.

SUMMARY OF ARGUMENT

This Court is required by the dictates of the ICWA, the facts that led to the enactment of the Act, and the continuing bias against Indian Nations to protect the rights of the Tribe and Tribal father herein. Principles of justice and the law of this land have rightly given needed protection to Indian children; that need and those principles require the Court to continue to extend this protection to all Indian tribes, parents, and children. The Arguments concentrate on California as a "case study" of why the ICWA was needed and is still needed. The Arguments hold true for all of Indian Country.

ARGUMENT

1. The Treatment of the California Tribal People by the Invaders Seared into the Fabric of our Relationship a Pervasive Ability for the Invaders and their Heirs to "See" Tribal People as Not as Good.

Internationally, countries are struggling with reconciling their desires to see themselves as honorable when they have a history of dishonor, particularly to the original inhabitants of the lands the current residents have come to see as belonging to them.[4] California has an exceptional record of dishonor, even

[4] See particularly the work of the United Nations Permanent Forum on Indigenous Issues.

among the many states of this union, which unfortunately has resulted in actions/beliefs being woven into its justice system, creating a foundation that historically has had difficulty self-correcting. California's troubled relationship with its tribal population is chronicled in the recent work of Brendan C. Lindsay who sets out the facts commenting that "The way Euro-Americans naturalized atrocity as the way to relate to Native peoples allowed the evidence to be preserved rather than destroyed, an ironic silver lining in an otherwise dark history of the attempts to eradicate Indians in California or at least do nothing to prevent such horrors."[5]

This particular genocide depended on a confluence of negatives. California was invaded by emigrants driven to find gold. Most were disappointed in their effort and later turned to the occupations of settlers, ranchers, farmers, loggers and merchants, all of which required acquisition of lands. These invaders came with a firm belief in manifest destiny (a belief shared with the entire country) that incorporated the view that being Indian was "representative of a condition" . . . and that condition was savagery. The supposed finding of savagery was based on generalizations and assumptions of inferiority blended with greed (based on the strong belief that tribal people had a natural inability to properly exploit

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[5] Brendan C. Lindsay, *Murder State: California's Native American Genocide, 1846-1873* 359 (2012).

"their" lands and resources). These views created a potent mixture that allowed for the extermination of people solely based upon membership in the group called Indians, rather than for the punishments/ consequences for any finding individual guilt for crimes committed.

Perhaps the most surprising revelation in the discussions presented by Lindsay are the twin facts that thousands of "Americans" coming to California hated and feared tribal people without ever seeing or interacting with a tribal person and when confronted with opposing experiences (e.g., favorable/friendly/ supportive interactions with tribal people) were unable/ unwilling to alter their hatred-fueled personal beliefs. This hatred, painful to see even from afar, was used to excuse mass murder, slavery, and the expropriation of property real and personal. Particularly germane to this discussion, it also justified the stealing/ enslaving of tribal children to serve the needs/desires of the emigrant non-tribal population. Said actions were legally and morally sanctioned.

The undisputed results of the deadly mix are starkly illustrated in the following table:

Population Estimates for California, 1848-1910[6]

Year	California Native Population	U.S. Native Population	California Non-Native Population
1848	150,000	n.d.	15,000
1850	n.d.	400,764	165,000
1860	35,000	339,421	379,994
1870	30,000	313,712	560,247
1880	20,500	306,543	864,694
1890	16,624	248,253	1,213,398
1900	15,377	237,196	1,485,053
1910	16,371	265,683	2,377,549

Inevitably it must come back to the leaders, the people who have the responsibility, to set the tone and to lead. These leaders chose not to fulfill their leadership responsibility but instead to cater to the electorate and their own perceived self-interests. The democratic institutions ALL citizens and non-citizens of this Country are encouraged to rely upon for guidance failed in moral/legal leadership by creating legal institutions that stood for and purposefully supported evil, disguised as legal precepts. Serranus C. Hastings, the first chief justice of the California State

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[6] Sources: Paul Stuart, *Nations within a Nation: Historical Statistics of American Indians* 52, 54, 57 (1987); Richard S. Hyslop, Crane S. Miller, *California: The Geography of Diversity* 10 (1983); Albert L. Hurtado, *Indian Survival on the Californic Frontier* 194 (1988); Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* 109 (1987); James J. Rawls, *Indians of California: The Changing Image* 171, 214 (1984). Data exclude Native peoples of Alaska and Hawaii.

Supreme Court, its third attorney general, and considered the founder of California law and order, was one such failure. He was a wealthy man and with an endowment created Hastings School of Law in San Francisco. Today, Hastings is part of the University of California and is an active and respective institution. As to Serranus C. Hastings, Lindsay notes,

> Indeed Hastings and many others used the democratic process and the republican government to call for and execute a massive genocide of 'Indians' during the second half of the nineteenth century. Hastings and his fellows committed, directly and indirectly, some of the foulest depredations that men have committed against their fellow men in human history, and they did so openly and under the color of authority, legally, and in the name of freedom and democracy, with the countenance of the silent majority of the non-Indigenous population acting as interested by apathetic bystanders. In fact the landed interests of men like Hastings formed the central motive for genocide in California.[7]

The first governor of California Peter H. Burnett was convinced that the "inevitable destiny" of Native Americans was extermination. Equally important was his belief that to abandon the push to exterminate would be to ignore his constituency's demands upon him as the top elected representative. His

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[7] Lindsay, *supra*, at 2, endnote omitted.

approach set the tone for successive governors. Governor Burnett and his successors approved wave after wave of private militias who were fielded in supposed moves to protect settlers but who in fact engaged in massacres of unprecedented magnitude, to protect their self-interests, specifically their economic interests.

In the beginning of the Gold Rush, the lust for gold combined with a huge influx of emigrants created a workforce void; i.e., California became labor-starved. Everyone was rushing to the gold fields and no one was left to do the necessary work away from the gold fields. Those that were left demanded high wages to justify not joining the rush. Into the void the State enacted Section 20 of *An Act for the Government and Protection of Indians*, Chapter 133, Statutes of California, 1850. The Act permitted low-cost Indigenous laborers to fill the void and they became the labor force needed to run the state while the majority of emigrants were consumed with gold fever.

Many of those laborers were child "apprentices" whose indentured status was sanctioned by law and approved by California Courts. Supposedly, apprenticeships ended at majority, but the practice was made more onerous by the 1863 repeal of Section 3 of Chapter 133. When the apprenticeship code was repealed, hundreds of Native American children were allowed to continue to live and work in white households via child guardianship laws. The information available as to how these children were placed in those white homes includes the murdering of parents

and the stealing of children from adults not able to offer armed resistance to slavers who sold such children for profit. Kidnapping and enslavement flourished because of the function of demand. There is little data available to detail the magnitude of the lost children or the lost childhoods of those who were able to return. Surviving data includes the following and should not be taken as illustrative of the depth of the problem.

Native Children Living in Non-Native Households[8]

Year	Children under 5	Children under 17
1863	n.d	4,522
1864	n.d.	5,987
1865	n.d	5,920
1866	427	1,629
1867	578	1,809
1868	324	1,558
1869	295	1,558
1870	382	1,551
1871	254	1,561
1872	247	1,526
1873	322	1,392
1874	206	1,348
1875	262	1,348
1876	290	1,405
1877	241	1,291
1878	372	1,552
1879	379	1,463

[8] Sources: Annual and biennial reports of the superintendent of public instruction of the State of California, *Journals of the Senate and Assembly of the State of California*, 1864-1880.

There are many more examples of wrongdoing on the part of California individuals and institutions, from the mass killing of unarmed Wiyots on Indian Island in Humboldt County to the failure of the Senate to ratify 18 treaties; treaties that were subsequently "hidden" and did not reemerge until 1905 to the embarrassment of the Federal Government. These points are important but they are but summaries for the grief, the grief of nations, including some who failed to survive, as documented by the anthropologist Theodora Kroeber in *Ishi in Two Worlds: A Biography of the Last Wild Indian in North America.*[9] I have never been able to read this important work as I cringe at the pain of someone who was the last of his people. To me it is an unimaginable pain. Could I have tolerated the pain of being a parent of a stolen child? Some Yurok women friends and I were talking about the numbers of children taken and the parents left behind and we knew that if the parent was present at the taking they were dead, or they became as dead. The telling of the story to the family is unimaginable. And the child who saw the parent killed . . . If I sit quietly I can hear the screams, I can hear the ancestors screaming, "Take anything, take it all, but do not take the child, not the child. Please not the child."

I know my people, my ancestors and I know what they would say. I can hear them say it. I know that

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[9] See Theodora Kroeber, *Ishi in Two Worlds: A Biography of the Last Wild Indian in North America* (1961).

some of the old people who were alive when I came to this place were there. Some of them saw or heard, some of them had family ripped apart, some of them knew slaves, knew us as slaves. And some of the old people still living knew the stories of the slaves. Some of the slaves ran away and came home. I have heard and read accounts of our ingratitude shown by running after all we were given, running home. It is not long and far away for us. We are not that sort. The pain is here in our hearts, our mountains, our high country, the River.

Our sorrows come from these times. And now these sorrows have become our failures. We now have a joint responsibility, the tribal and the non-tribal people. We each own a horrible part of the failure. Nothing I say here or anywhere is meant to abrogate personal, family, village, or our Nation's responsibility for the state of our families, or for what is currently happening to our children. But it is not solely ours. And it is incumbent on each to act with honor and responsibility as we move forward.

2. Having Survived Genocide in Tribal Homelands Across the Country, Tribal People Argue that this Court Must Not Cloak this Century's Desire for Tribal Children in False Claims.

The ICWA came into being because the United States was shamed by its treatment of Indians, more specifically Indian children in the few hundred years

since the invasion. It is a shame many would argue belongs to the past, to a time distant from all of us now living. There is no more wholesale stealing of children for slaves/indentured apprentices or holding children hostage so that families would starve if they did not surrender them to the Indian Boarding Schools. Instead in the recent decades prior to the enactment of the ICWA the arrogance/greed has remained in the guise of "the best interest of children." Best interest was defined via a cultural lens that viewed culturally based child rearing differences and poverty to be equated to neglect.

The States having thus defined best interest so as to allow for the separation of Indian children from their Nations, extended family organizations (clans/villages) and families, used Indian children to again fulfill a demand for children, for our children. The demand continues. Today non-tribal people still seek our children. They want to raise our children and in doing so identify themselves as better able, better parents, and, in the instant case, better than the Indian father. By our relationship/identification with the father, he and we are portrayed as victimizing those who took his child. To justify this view, they are required to label us as bad, as less than others; who else would not deserve to have their children? That is the implication. The bias found in the emigrants who came to California, is now being played out in today's press much as it was by the press in Governor Burnett's time, as the media heaps sympathy upon the kidnappers and those who would subvert the law.

(The early apprenticeship law forbade the kidnapping of children, but there was no enforcement of that prohibition.) The bias that festered in non-tribal people in the 1800's, even when presented with experience(s) inconsistent with those beliefs, lives today in many places and underscores our relationship with non-tribal people and the governments they have formed, particularly the local state and county governments. When "facts" are viewed through the lens of bias belief systems, tribal children can be wrongfully used to fulfill the non-Indian demands for children.

Very few people, if any, will admit to allowing a negative bias to dictate their behavior. In the mind of the biased, that bias is converted into, a duty that must be discharged toward others who are less able or less willing to conform to what is seen as proper behavior. They believe that they are saviors, the right doers.

In this case, the ongoing representational case of stolen Indian children, an increasing number of Indian people know the language of the oppressors, are increasingly educated in the oppressors' schools, are demanding that our children not be "legally" kidnapped, and are fighting back.

The ICWA brought squarely to the table the fact that state social welfare systems had become the new purveyors of Indian children. Protected by law, state social welfare agencies had supplanted the vigilantes and cavalry of the last centuries, who had also been

protected by law. The goals were the same: Take the children, and take them from their parents/families/communities/Nations. All the taking was assumed to better their situations, to improve them and their lot in life, to rid them of the stigma (as much as possible) of their Indianess.

It is important to remember that we did not fight alone, we had the strength of our ancestors, who we believe guide us; the strength of our places, beliefs and practices; and the strength of our Nations. And we had new friends, friends who had taken responsibility, as humans should, and said: No More! It was a courageous stand for many, and many were disparaged for it. But in the end the ICWA became the law of the land. There is no more justification for taking our children from us now than there was in the time of prior kidnappings. Does that mean we can all parent? Of course not. The reality is that the "sorrow" has come and we must look, as all besieged nations must, toward caring for our children. But our sorrow does not allow or justify taking from us our responsibility for our children.

Many people want children but that wanting cannot be legally allowed to overwhelm the rights of Indian Nations and of those Nations' children. Tribes have and will continue to place children with friends who are not native but it is by their decision, and it is truly individualized. We are bi-cultural, and we can and will continue to make those decisions to place with non-tribal friends. It is our right to do so. It is not acceptable to Indian people to fail to see us as

Nations entitled to control our own fate. It is essential to any Nation's survival.

3. Returning to the Time Before the Indian Child Welfare Act is to Weaken Our People, Our Nations, and to Place us at the Mercy of Those Who Have an Ongoing History of Justifying Kidnapping Our Children.

I was there in a way you were not. It is my responsibility to tell you, to tell the story. It is not one I like to remember. I do not like to see humans, any humans do horrible acts, and I turn away as do all. But you must see. I was in the Courts of California and New Mexico. I saw your lawyers and your Courts. I saw/felt the tears of my people as they were subjugated. I felt my own anger, anger as a Yurok, as a lawyer, because I too had gone to school, to your law school and wanted to believe in justice. To believe that what the law deems as discrimination, usually in retrospect, only needed to be exposed in a Court for it to fade in the light of justice.

Many times Indian parents did not even fight. Their lawyers convinced them before the hearing that they would lose so why bother; or knowing/fearing the laws they drowned in their sorrows and did not come. I was left to counsel clients, "Come, and even if you lose you will be able to say to your child, to your family, I fought, but I lost. No matter what they say I wanted you to know that I cared, that I tried, that I have and will always love you." Some of them could

not parent. Some of them could have if they had been helped by the system, as the system was supposed to have helped them and if the system had been held accountable, but it was not. And some of them did not need help. They were simply poor and/or different from the workers who therefore saw them as unfit. I saw how they were treated, the disrespect. I had judicial staffs look at me with disdain and tell me to step into the galley as the area I was in was reserved for lawyers . . . And I would say, "But I am a lawyer." I would have to show my bar card to counter their disbelief, because everyone knows that Indians are defendants/respondents not lawyers. In fact one judge said from the bench, "You can't be a lawyer, you're an Indian." This was said in words and actions in front of my clients. It was a level of disrespect that I had come to expect and know that I could not react or object, but I felt pain for myself and for my relations. The lawyers laughed at me, threatened me, demeaned me, spit on me, lied to me, lied about me and about my clients. They could and they did get away with it. It was not universal, and that is the good of it.

Some helped and some believed, as did Felix S. Cohen, a second generation Jewish American and a major legal figure in American legal history in the first half of the twentieth century. Cohen is best known for his realistic view of the law and his efforts to assist Native Americans to obtain more control over their own cultural, political and economic affairs. He authored the seminal treatise *The Handbook of*

Federal Indian Law. As Dalia Tsuk Mitchell wrote in her *Architect of Justice – Felix S. Cohen and the Founding of American Legal Pluralism*:

> Indians had taught Cohen the need to cherish cultural pluralism both because they were most discriminated against and because Indian philosophy was predicated upon respect for diverse opinions. . . . The Indian tribe is the miner's canary, and when it flutters and droops we know that the poison gasses of intolerance threaten all other minorities in our land. And who of us is not a member of some minority?[10]

Cohen was a beacon to others who stood with us during the times when new strategies were developed to take our children. We were fighting in obscure courtrooms and in Congress. We wanted our children. We wanted to protect them. We are required by our values to try and protect them.

And then came the ICWA. It was like we were heard, and we experienced the glory of being heard. I am not sure you, the Supreme Court Justices, can ever truly know the glory of being heard. I had by that time begun teaching younger lawyers, and I told them, "If you cannot bear losing, do NOT practice Indian law because you will lose most of the time. If it is not enough for you to do the right thing without

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[10] Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* 265 (2007).

winning, do not do this or it will break you." But this Act was passed. We were heard.

Social workers and Judges all thought that the findings made after countless congressional hearings were about others. It could not have been them that "caused" the law; that this indictment of them was really not about them but another judge or social worker in another court room, another county, or another state. But it was them. I knew it, the parents knew it and the Tribes knew it. And the practices began to change because of ICWA. The Courtrooms and the departments began responding to the pressure of lawyers. Judges and lawyers, some of whom had always stood with us, could now say to colleagues: It is the "law." And we tribal lawyers, and lawyers for Tribes and tribal people could say this is the law of the land now; you must protect tribal children.

I have devoted countless hours to training judicial officers, lawyers, and social workers on the Act. I began that in 1978 and continue to this day. And the trainings remain necessary because the bias that supported the views of Governor Burnett and Chief Justice Hastings still permeates the work of our systems. I see it in their faces; I hear it in their questions. It is demonstrated in their exasperation with the damn requirements of that "bloody Indian Act."

But those of us who have preferred to work at the level of the people were heartened by the ICWA, and

remain heartened by its promises. The judicial system can be unwieldy, but it can be glorious when it leads, as it should, when it remains true to its principles of justice. Just as a Yuroks are required by custom to both adhere to values, and help others adhere to our values, this Court can and should lead in the same way. It does make a difference on the ground, down here where we are. We do look to your leadership. We the Tribal people of this Country need this protection and you are the protectors charged with the ability and the responsibility to protect. Congress spoke. We needed them and we need you to remember their words, to not remove this protection. The need is still present. Our need is present. Our children, our families, our communities and our Nations are still in harm's way. It is said that our children are our greatest resource; they are not resources to us, not commodities, they are the blood of our being, we cannot exist without them, we are not whole without them. What people are? Are we so different than you? Please do not take the children; if you invalidate this law, you will be a member of the raiding party.

CONCLUSION

These words are mine, they are mine alone, they are my responsibility, and no one else's. If you take exception to them please limit your rancor to me and me alone. Whether you help or do not help know I would not take your children, even if I could take

your children. I would not because in my world that is wrong, I would not do it and if it was in my power to prevent others from doing it, I would.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-399

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IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A Minor Under the Age of Fourteen Years, BIRTH FATHER, and the CHEROKEE NATION,

Respondents.

ON WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

BRIEF OF *AMICUS CURIAE* ADOPTIVE PARENTS COMMITTEE, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Adoptive Parents Committee, Inc. (APC) is a non-profit parent support group comprised of volunteers dedicated to improving all aspects of adoption and interim (foster) care. APC, the oldest adoptive parent group in North America, was formed in 1955 by a small group of people who shared their adoptive experiences. Today, there are more than 1,500 member families who belong to one of APC's four chapters: Long Island, New York City, New Jersey and the Connecticut/Hudson Region. Some of our members are from Florida, Virginia, Pennsylvania and other states throughout the country. APC is an advocate for humanitarian improvements in the adoption and foster care system. Our goal is to Let Every Child Eligible For Adoption Become Available for Adoption. APC is also committed to educating the public, the media and its members about current adoption issues. This brief is submitted out of shared concern that the best interests of the child was ignored by the Supreme Court of South Carolina in applying the ICWA to block the adoption of Baby Girl where neither the child nor her mother had any meaningful connection to tribal sovereignty or lands, and where the biological father had no standing as father under the ICWA or the Constitution. APC believes that unless the decision and order of the SC Supreme Court is reversed countless other children will suffer the fate

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

of Baby Girl and be wrenched from the only parents and family that they know in a misguided application of the ICWA to preserve a non-existing Indian family.

SUMMARY OF ARGUMENT

The South Carolina Supreme Court decision and order unquestionably will have a chilling effect on adoptions of children with some Indian blood throughout the country. Adoptive parents will be unwilling to open their hearts and their homes to adopt a child with any measure of Indian blood out of fear that their child can be wrenched from their care and the family disrupted by the late emergence of an unwed non-custodial biological Indian father at anytime after they have bonded to the child, and the child to them, under this misguided application of ICWA. The desired outcome of increasing tribal membership will not be the result. Instead, if this decision is allowed to stand it will signal that unwed mothers of children with any Indian blood but no ties to a tribe or tribal life, will be forced to parent their unwanted child as they are unable to find adoptive homes all in the name of preserving the non-existent Indian family.

In our view, the dissent opinion (Kitteridge, J.) more fairly depicts the facts leading to the placement of Baby Girl with appellants for adoption. Even the most liberal reading of the majority recitation of the facts reveals a determined effort to excuse and explain away the birth father's admitted abandonment of Baby Girl and to portray the adoptive parents as scheming to skirt the ICWA, neither of which are true.

ARGUMENT

POINT I

THE DECISION BELOW IS CONTRARY TO THE BEST INTERESTS OF CHILDREN AND WILL PREVENT OTHERWISE DESIRABLE ADOPTIONS FROM OCCURRING.

The decision made by the South Carolina Supreme Court pays mere lip service to the best interests of children and will undoubtedly prevent the adoptions of children with Indian blood. Adoptive parents will be discouraged from opening their hearts and their homes to children in need, simply because they may have a measure of Indian heritage. Painfully aware of the heartbreak that has resulted from such misguided applications of ICWA as this, families who want to adopt a child into their homes will understandably shy away from adopting any child with even the possibility of Indian blood out of the very real fear that a previously uncommitted father or tribe can emerge at any time and break the bonds they have formed with the child. The desired outcome of increasing tribal membership will not be the result. Instead, if this decision is allowed to stand it will signal that unwed single mothers of children with any Indian blood but no ties to a tribe or tribal life, will be forced to parent their unwanted child as they are unable to find adoptive homes all in the name of preserving the non-existent Indian family.

The day should have long passed in this country when children are treated as chattels and unwed fathers can chauvinistically dictate when, and if, they deign to act as a father to their out-of-wedlock child. It is both demeaning and patronizing to hold Indian fathers less

responsible for their out-of-wedlock child than non-Indian father. Hopelessly lost in the South Carolina Supreme Court interpretation of the ICWA is the best interests of Baby Girl. Her right to a permanent, stable and loving home and her right to have her bonds of love and attachment to her adoptive parents respected and not interfered with were ignored by the South Carolina Supreme Court decision. Baby Girl's rights and interests are of constitutional dimension and should have been of paramount importance in the court's consideration of her state adoption proceeding.

The State has an important interest in "ensuring swift, permanent placements" of newborns that "are more likely to be adopted and more readily bond with adoptive parents." *Matter of Raquel Marie X.*, 76 N.Y. 2d at 404, 406, 559 N.E.2d at 425, 559 N.Y.S.2d at 862. "Certainty and finality" are what the law seeks to achieve precisely to protect the infliction of needless harm. See *Matter of Sarah K.*, 66 N.Y.2d 223, 234, 487 N.E.2d 241, 246, 496 N.Y.S.2d 384, 389 (1985), *cert. denied sub nom. Kosher v. Stamatis*, 475 U.S. 1108 (1986). See also *Matter of Raymond AA v. Doe*, 217 A.D. 2d 757, 759, 629 N.Y.S.2d 321, 324 (3d Dept. 1995), *lv. app. denied*, 87 N.Y.2d 805, 663 N.E.2d 919, 640 N.Y.S.2d 840 (N.Y 1995) ("It is axiomatic that the State has a legitimate interest in establishing procedures which assure both a prompt adoption and the stability of the adopted child.").

Non-Indian single mothers with sole legal custody who are unable or unwilling to parent their child with any iota of Indian blood will find potential adoptive homes closed to them. The states interests in "ensuring swift, permanent placements" of newborns that "are more likely to be adopted and more readily bond with adoptive

parents" will be frustrated and the laudable goal of preservation of Indian Tribes and Indian culture will not result from this South Carolina Supreme Court decision. The non-custodial parent should not have been allowed to invoke the ICWA to block the adoption of Baby Girl that was lawfully initiated by her non-Indian custodial parent under state law. Application of the EIF would have prevented such an egregious result as occurred here.

POINT II

THE ICWA DOES NOT APPLY WHERE THE UNWED FATHER FAILS TO COMPLY WITH STATE LAW TO ATTAIN A CONSTITUTIONALLY PROTECTED PARENTAL INTEREST. THE DETERMINATION OF THE UNWED FATHER'S PARENTAL STATUS IS PROPERLY RESERVED TO THE STATES.

Adoptions are creatures of statute and did not exist at English common law. Therefore, the determination whether the consent of the biological father is required for the adoption of a child born-out-wedlock remains the exclusive province of the states.

Unwed fathers constitutionally protected rights do not automatically come into being. ("[T]he mere existence of a biological link does not merit [ ] constitutional protection. The actions of judges neither create nor sever genetic bonds." *Lehr*, 463 U.S. at 261). Through a series of cases including *Quilloin v. Walcott*, 434 U.S. 246 (1978), *Caban v. Mohammed*, 441 U.S. 380 (1979), *Lehr v. Robertson*, 463 U.S. 248 (1983), this Court clarified that the Constitution does not protect all unwed fathers equally and that, more importantly, the mere act of impregnating a woman does not create constitutional rights.

Considerably more is required of men than the mere act of procreation to secure constitutionally protected parental rights. As this Court explained in *Lehr*, all unwed fathers possess only an "inchoate interest" (463 U.S. at 265) which may, if they take meaningful steps to secure them, turn into constitutionally protectable rights. Whether this "interest" becomes a "right," however, depends entirely on the action or inaction of the unwed father.

The treatment accorded the unwed father varies from state to state. South Carolina, like New York, and many other states, requires, in the case of the adoption of a newborn (i.e. a infant under six months of age), that the unwed father take certain definitive action in the six months preceding the birth and placement of the child for adoption (which correctly prioritizes the emotional health of the infant over the interests of the parents), if he is to attain legal status as a parent.

The ICWA is not in conflict with these Supreme Court holdings regarding the differentiation in the status of the unwed biological Indian father. It also recognizes that mere biology is not enough so that not every unwed biological Indian father comes within its ambit. See, e.g. 25 U.S.C. 1903 (9)[2] (defining "Indian parent" as an unwed father who has established or acknowledged paternity). The ICWA denies recognition to the unwed father who does not establish or acknowledge his paternity.

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2. The ICWA defines parent as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. *It does not include the unwed father where paternity has not been acknowledged or established.*" 25 U.S.C. 1903 (9) (emphasis added).

Yet, the ICWA contains no provision for determination of the status of the unwed father. It has no explication of what acts shall constitutes 'establishing' or 'acknowledging' paternity, nor the time frame for doing so. The ICWA is silent on how and when the unwed Indian father's parental status is determined. South Carolina Supreme Court should have concluded that since the Congress made no ICWA provision for the timetable or the means by which the unwed father must act to acquire parental status that the Congress intended that the state laws would control. The ICWA defers to state law to determine whether the unwed Indian father's actions are sufficiently prompt in the case of an adoption of a newborn and substantial under state law to require his consent.

In termination[3] of parental rights proceedings, the ICWA looks to State law for the grounds for termination. So too in adoption proceedings, the ICWA looks to state law to determine whose consent is required for the adoption. It is the state law that must applied in determining the status of the unwed Indian father. And while, the ICWA may impose certain procedural protocols to be followed (e.g. proof beyond a reasonable doubt in termination proceedings instead of clear and convincing evidence), it does not create rights for the unwed biological father who is not an "Indian parent." That responsibility is reserved to the state.

Insofar as the respondent father was concerned, this was not a termination of parental rights proceeding since under South Carolina adoption law the respondent's

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3. The ICWA defines 'termination of parental rights proceedings' as "any action resulting in the termination of the parent-child relationship." 25 U.S.C 1903(1)(ii).

inchoate interest never became a right worthy of constitutional recognition. No parental "right" of his was terminated. Rather, it is better understood as a proceeding to determine the respondent's status under South Carolina adoption law.

State law recognizes that the best interests of the adoptive child require an prompt determination of permanency. South Carolina does not allow any unwed father who fails to promptly establish his parental interest by performing objective acts of responsible parenthood (e.g. contributing to the financial cost of pregnancy and birth related expenses within the six months preceding the placement of the child for adoption) to block the adoption long after the birth and placement of the child for adoption. See, S.C. Code section 63-9-310(A)(5).[4]

The ICWA can only apply to unwed Indian fathers whose parental status is recognized by state law. The unwed Indian father, like every other unwed father, will have legally recognizable parental rights only by dint of his timely exercise of his parental responsibility as evidenced by contributing financial support for the pregnancy and

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4. For a child being adopted within six months of birth, the unwed father's consent is required but only if "(a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption, and the father openly held himself out to be the father during the six month period; or (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for the expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital and nursing expenses." S.C. Code Ann. Section 63-9-310(A)(5)(2010).

birth. The disinterested, inactive, or abandoning unwed Indian father, like respondent, attains no constitutionally recognizable parental right to begin with under state law.

Respondent knew of the pregnancy and due date for Baby Girl's birth. Yet, respondent was not present for Baby Girl birth. Respondent refused to pay anything toward the pregnancy and birth related expenses. Trial Tr. 545-547. As noted by the dissent "Father failed to pay any child support until Baby Girl reached sixteen months of age and did so inconsistently and in an insubstantial amount."

> "Father made no meaningful effort to establish a relationship with Baby Girl when there was ample opportunity for him to do so. To the contrary, he avoided any rights and responsibilities to the child. As noted, on repeated occasions, Father expressed his willingness to sign away his parental rights."
>
> (Kitteridge, J. dissent)

While the respondent's various written and verbal expressions giving up his parental interest may not have been in legally binding form, they unequivocally confirm he abandoned any parental interest he had in Baby Girl. Such behavior was the antithesis of establishing or acknowledging paternity. The dissent too correctly determined that the father's actions "came too late" to defeat his abandonment.

Here, the respondent did not satisfy state adoption consent prerequisites within the critical time frame, that is the six months before the birth and placement of Baby

Girl for adoption, so as to entitle him to recognition as an Indian parent whose consent is required by South Carolina for this adoption. Therefore, since the respondent is not an Indian parent for the purpose of adoption then the ICWA should have had no application here.

The respondent's status was not a result of anything that the custodial birth mother or the adoptive parents did, nor was it the result of the meddling by the state actors in denigration of his Indian status. Respondent's non-consent status resulted pure and simply from his clear and unequivocal choice not to assume the mantel of parental responsibility toward his child who thus never became a part of an Indian family. The ICWA never should have been implicated under these facts.

The legal conclusion reached, but not followed, by the South Carolina Supreme Court that the respondent failed to acquire the legal status of a "consent father" under South Carolina law, breaks no new ground and follows well-settled principles of constitutional law governing the rights of unwed fathers. It should have been dispositive of this adoption. Instead, the SC Supreme Court allowed the respondent unwed father with no recognizable constitutional status under state law as Baby Girl's legal parent to block the adoption by invoking the ICWA with devastating effect on Baby Girl and her adoptive parents.

South Carolina Supreme Court wrongly interpreted the ICWA to afford a non-custodial unwed Indian father greater parental rights than South Carolina unwed non-Indian father. The South Carolina Supreme Court treatment of the unwed Indian father is condescending and patronizing - unwed Indian fathers are not expected

or required to act promptly as responsible fathers as are non-Indian unwed fathers. This interpretation wrongly presupposes that having a Indian father it is not important for the Indian child in the care of non-Indian single mother. It wrong headedly permits the unwed Indian father a virtually limitless amount of time in which to decide whether he wants to father his child and take the necessary steps that would establish his interest. The result is to hold the adoptive child and her single non-Indian mother hostage while the father dithers. There were no cultural barriers or unfair institutional hurdles in his way that require the ICWA remediation. The only barrier to this unwed Indian father's meeting the requirements of state law was his own obstinacy ('marry me or raise the child yourself without any help from me').

When Baby Girl was born and placed for adoption she had no "Indian parent" as defined by the ICWA. The ICWA definition of Indian parent clearly excluded the respondent. By the time he took some action, Baby Girl had already been placed in her adoptive home for four months and thriving there.

South Carolina Supreme Court wrongly ignored state adoption law and applied the ICWA in a misguided effort that allowed the unwed father virtually limitless time in which to acknowledge or establish his paternity which totally ignores the reality of Baby Girl's existence. Rather than require prompt action by the unwed father the South Carolina Supreme Court gave him a pass. Under its rationale it matters not at all how long the unwed father delays or how deleterious the effect that his delay has upon the emotional health and development of the child. This cannot be countenanced. Instead, as this Court held in

Lehr v. Robertson, 463 U.S. 248 (1983) ("legitimate state interests in facilitating the adoption of young children having the adoption proceeding completed expeditiously." *Lehr, Id.* at 265).

The law cares about actions of the unwed putative fathers, Indian and non-Indiana like, because actions are traceable and knowable to adoption agencies and prospective adoptive resources. This is why both the South Carolina Legislature and the ICWA require that unwed fathers promptly take visible, definitive actions in accordance with state law that establishes their parental right so that adoption agencies and prospective adoptive parents will be able to know whether the child has a Indian father whose consent to her adoption is required.

The law does not require that prospective adoptive parents take risks when they accept out-of-wedlock children with Indian blood from non-Indian custodian single parent into their homes and their hearts. States are free to fashion laws that protect the rights of unwed fathers but also advance sound public policy by encouraging unwed mothers to place children for adoption when the children are infants and also by encouraging adoptive couples to accept children into their home free from fear that months after they have bonded with their child a virtual stranger will emerge and demand "his" Indian child.

POINT III

A NON-CUSTODIAN UNWED FATHER MAY NOT INVOKE THE ICWA TO BLOCK A VOLUNTARY ADOPTION INITIATED BY THE NON-INDIAN CUSTODIAL MOTHER WHERE THERE IS NO EXISTING INDIAN FAMILY FROM WHICH THE CHILD IS BEING REMOVED.

This case does not involve abusive child welfare practices resulting in the removal of Indian child from her Indian home. It does not involve involuntary removal of an Indian child from her custodial Indian parent. It does not involve the termination of an Indian parent's parental rights. It does not involve defying tribal sovereignty by Indian parents leaving the reservation to give birth. Instead, it involves a non-custodial unwed father who although a registered member of the Cherokee Nation, nevertheless was not an Indian parent as defined by the ICWA.

It involves a respondent birth father who never had legal or actual custody of Baby Girl and who refused to contribute to her prenatal care, pregnancy and birth related expenses. This respondent father, in fact, agreed in word and deed that Baby Girl would be raised by her mother, a single parent with sole legal custody in a non-Indian home and not by him or his family. Prior to Baby Girl's birth and placement for adoption the respondent never established a constitutionally recognized right as Baby Girl's father. The respondent only acted to block Baby Girl's adoption by the only parents and family she had known by invoking the ICWA. Under these facts, the ICWA should not have been implicated.

The Existing Indian Family Doctrine Remains Viable and Dispositive in this Case.

The SC Supreme Court determination to reject the Existing Indian Family doctrine ("EIF") out of hand because it contradicts the purpose of ICWA is plainly wrong as EIF actually supports the purpose of that statute. The ICWA's stated purpose is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal Standards for the removal of Indian children from their families ***". 25 U.S.SC. 1902 [emphasis supplied]. Thus the plain text of the statute itself refers to existing "Indian***families" and the removal of Indian children from existing Indian families. 25 U.S.C. 1902. Congress also intended for the various state courts to determine when the ICWA should apply to a particular case. *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587, 591 (10th Cir.1985) (refusing to review state court's determination that ICWA did not apply under *res judicata* and full faith and credit principles).

The legislative history of the statute, as well as its words, confirm that the 'overriding concern of the ICWA is the maintenance of existing Indian familial and tribal relationships and to set minimum standards for the removal of Indian children from existing Indian environments. Courts in other states have followed this sound reasoning in cases where there is no existing Indian family from which the adoptive child is being removed. [cite cases from Petition for cert].

A number of courts in other states have applied the EIF in cases where there is no existing Indian family

from which the adoptive child is being removed. See, e.g. *In re Santos*, 92 Cal. App. 4th 1274, 112 Cal.Rptr.2d 692 (Cal. Ct. App., 2nd Dist. 2002) (California); *In re Crystal R.*, 59 Cal.App.4th 703, 69 Cal.Rptr.2d 414 (Cal. Ct. App., 6th Dist. 1998) (California); *In re Bridget* R., 41 Cal.App.4th 1483, 49 Cal.Rptr.2d 507 (Cal. Ct. App., 2nd Dist.1996) (California); *In re Alexandria Y.*, 45 Cal.App.4th 1483, 53 Cal.Rptr.2d 679 (Cal. Ct. App.1998) (California); *In re Interest of D.C.C.*, 971 S.W.2d 843 (Mo.Ct. App. 1998) (Missouri); *S.S. v. E.J.P. and R.L.P.*, 571 So.2d 1187 (Ala. Civ.App. 1990) (Alabama); *Rye v. Weasel*, 934 S.W.2d 257(Kent.1996) (Kentucky); *Hampton v. J.A.L.*, 658 So.2d 331 (La. Ct. App. 1995) (Louisiana); *Matter of Crews*, 118 Wash.2d 561, 825 P.2d 305 (Wash.1992) (Washington); *In re Morgan*, 1997 WL 716880 (Tenn. Ct. App. 1997) (Tennessee). As the Court in *Matter of T.R.M.* stated, the recognition of EIF is entirely sensible, as there can be no "breakup of an Indian family", which Congress intended to prevent with the ICWA, where no such Indian family already exists. *T.R.M.*, 535 N.E.2d at 3030. Other state courts have reached a different conclusion and refused to apply the EIF. *Baby Boy C.*, 805 N.Y. S. 2d (1st Dept. 2005) at 322 n. (collecting cases).

The ICWA is Unconstitutional Unless the EIF Exception is Recognized.

Without the EIF exception, the ICWA is unconstitutional because the ICWA implicates suspect racial classifications and violates a child's due process rights. The South Carolina Supreme Court concluded that the Nation's interests, not the child's fundamental rights, were paramount. But, there is no authority for the proposition that when there is no existing Indian family

and the child has no cultural, social, or political ties to a tribe, the ICWA preference is nothing more than the type of racial preference prohibited by the Constitution. Baby Girl has rights protected by the Constitution[5] with respect to this effort to sever her familial relationship with her Adoptive Parents. State courts must recognize the EIF exception to the ICWA to protect the constitutional rights of children like Baby Girl who have no ties, other than blood, to an Indian tribe. The EIF is a necessary part of acknowledging the principle that children are not mere chattels and have their own fundamental interests of a Constitutional dimension.

The California Court of Appeals decision in *Bridget R.*, is the leading case on this issue. *Bridget R.* involved two adopted twin children who were children of a non-Indian mother and a part-Indian father. *Bridget R.*, 41 Cal.App.4th at 14919. The birth parents initially consented to the children's adoption, but after the father's tribe became involved, they initiated proceedings to invalidate their consent under the ICWA. *Id.* There was "substantial doubt" whether the Indian parent had ever participated in tribal life, or maintained any significant cultural, social, or political relationship to the tribe. *Id.* The *Bridget R.*, court determined that the EIF exception was necessary to preserve the constitutionality of the ICWA as applied to such facts. *Id. at* 1492. The court held that the ICWA could not constitutionally be applied under the Fifth, Tenth, and Fourteenth Amendments to a voluntary relinquishment of

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5. *See, Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982) (attempt by biological mother to remove child from foster care – Court recognized hat the children did have a liberty interest with respect to their family environment entitled to due process protection. *Id.* at 1026, citing *Parham v. J.R.* 442 U.S. 584, 596-97 (1979).

parental rights respecting an Indian child not domiciled on a reservation, unless the child's biological parent or parents are of Indian decent and also maintain significant social, cultural, or political relationship to the tribe. *Id.*

The *Bridget R.* court noted that children have a constitutionally protected fundamental interest in maintaining established familial bonds and in the continuity and stability of their homes, whether those bonds are with biological or *de facto* family, and held that those rights are subject to the requirements of both procedural and substantive due process. *Id.* at 1502-07. The court also indicated that these rights were no less fundamental because those bonds were formed with an adoptive family after a knowing, intelligent and express relinquishment of parental rights. *Id.* at 1506-07. Because these rights are fundamental, legislation that interferes with them is subject to strict scrutiny, and must be set aside unless it serves a compelling governmental purpose and is necessary to accomplish that purpose. *Id.* at 1503. With respect to tribal rights designed to be protected under the ICWA, the court noted that the preservation of Indian culture was a compelling governmental purpose but found that this purpose would not be served by applying the ICWA in cases where the Indian parents have no significant social, cultural, or political relationship with the tribes. *Id.* at 1507. Where a fully assimilated Indian parent seeks to voluntarily relinquish his or her children for adoption, there is no necessity to apply the ICWA to preserve Indian culture, because no culture exists in the first instance. *Id.* at 1507-08. Applying the ICWA under such circumstances would violate the child's fundamental right to remain in a home where she is loved, well-cared for, and lives with parents to whom she

becomes more attached to each day and who provide her with a secure environment in which to learn and grow. *Id.* Accordingly, the *Bridget R.*, court concluded that the ICWA impermissibly violates the child's fundamental due process rights when applied in a case where there is no existing Indian family. When there are no cultural, political or social connections to the tribe, the sole criteria for restricting the child's rights must be the child's race, which raises constitutional concerns. *See, Santos*, 92 Cal. App.4th at 1318-19 (rejecting argument that application of the ICWA solely on racial classification of child is merely a political classification under *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474 (1974).

The EIF is Consistent with this Court's *Holyfield* Decision.

The South Carolina Supreme Court was wrong to dismiss the EIF doctrine as inconsistent with this Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597 (1989). In *Holyfield*, the Court addressed whether two Indian parents who were residents and domiciliaries of a reservation could defeat the provisions of ICWA granting exclusive jurisdiction over adoption proceedings involving domiciliaries of the reservation to tribal courts merely by leaving the reservation to give birth to their child. *Holyfield*, 490 U.S. 32-54. The Court held that the jurisdictional requirements of the ICWA could not be defeated by temporarily leaving the reservation.

But, *Holyfield*, never addressed the EIF and did not involve the situation presented here, where neither the child nor the custodial parent, her single mother, had any

significant contact with the tribe or its culture, and the child's mother did not intend to raise the child in tribal culture and the respondent biological father never had custody and had ceded all parental control and custody to the non-Indian birth mother.

Holyfield, is limited to cases involving domiciliaries of a reservation and does not apply to a custodial parent and her child who have no connection to an existing Indian tribe or culture. The plain text of the statute 25 U.S.C. 1902 states that the purpose of the ICWA is to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the *removal of Indian children from their families*. . . "25 U.S.C. 1902 (emphasis added). The plain text of the statute itself refers to existing Indian families and the standard for removing children from existing Indian families. It is also clear that the applicability of the ICWA is left to the state courts for resolution in each specific case. *See Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587, 591 (10th Cir. 1985) (refusing to review state court's determination that ICWA did not apply under res judicata and full faith and credit principles). The day should have long passed when children are treated as chattels and the unwed father can chauvinistically dictate when, and if, they deign to act as a father to their out-of-wedlock child. It is both demeaning and patronizing to hold Indian fathers less responsible for their out-of-wedlock child than non-Indian father.

The State has an important interest in "ensuring swift, permanent placements" of newborns that "are more likely to be adopted and more readily bond with adoptive parents." *Matter of Raquel Marie X.*, 76 N.Y. 2d at 404,

406, 559 N.E.2d at 425, 559 N.Y.S.2d at 862. "Certainty and finality" are what the law seeks to achieve precisely to protect the infliction of needless harm. *See Matter of Sarah K.*, 66 N.Y.2d 223, 234, 487 N.E.2d 241, 246, 496 N.Y.S.2d 384, 389 (1985), *cert. denied sub nom. Kosher v. Stamatis*, 475 U.S. 1108 (1986). *See also Matter of Raymond AA v. Doe*, 217 A.D. 2d 757, 759, 629 N.Y.S.2d 321, 324 (3d Dept. 1995), *lv. app. denied*, 87 N.Y.2d 805, 663 N.E.2d 919, 640 N.Y.S.2d 840 (N.Y 1995) ("It is axiomatic that the State has a legitimate interest in establishing procedures which assure both a prompt adoption and the stability of the adopted child.").

If this decision is allowed to stand it will have the unintended consequence of reducing the number of adoptions for children most in need of permanent loving homes. The Constitution does not require such a poor public policy. The Order below is not faithful to the Constitution and should be reversed.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be reversed.

February 26, 2013

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No. 12-399

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

BRIEF FOR AMICI CURIAE ADULT PRE-ICWA INDIAN ADOPTEES SUPPORTING BIRTH FATHER AND THE CHEROKEE NATION

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INTEREST OF AMICI CURIAE

Amici are Indians who were adopted as children before the passage of the Indian Child Welfare Act and raised in families outside their Tribes.[1] Amici are thus personally familiar with the serious long-term social and psychological consequences of child placement

[1] Pursuant to Rule 37.3(a), letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae or their counsel made any monetary contribution to the preparation or submission of this brief.

practices that fail to appreciate how important recognition of an Indian child's tribal heritage and participation in his or her tribal community can be to the child's sense of identity. Amici urge this Court not to retrench on the important progress that has been made in recent decades for Indian children, but rather to affirm the importance of giving tribal heritage substantial weight in determining the best interests of an Indian child.

A full list of amici is provided as an Appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In enacting ICWA, Congress sought "'to protect the rights of the Indian child *as an Indian* and the rights of the Indian community and tribe in retaining its children in its society.'" *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 37 (1989) (quoting H.R. Rep. No. 95-1386, at 23 (1978)) (emphasis added). The statute achieves that goal "by establishing 'a [f]ederal policy that, where possible, an Indian child should remain in the Indian community.'" *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23). While one focus of ICWA was to halt harmful practices that led to the involuntary placement of Indian children in non-Indian foster and adoptive homes, *see* 25 U.S.C. § 1901(4), ICWA also sought to prevent *voluntary* adoptive placements that separated Indian children from their Tribes without due consideration of the effect that separation would have on both the children and the Tribes. As this Court stated in *Holyfield*:

> Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the

> children themselves of such placements outside their culture. Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, *even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents.*

Holyfield, 490 U.S. at 49-50 (emphasis added and footnote omitted). Among other things, those concerns reflected a congressional finding that "[r]emoval of Indian children from their cultural setting seriously impacts ... long-term tribal survival and has damaging social and psychological impact on many individual Indian children." *Id.* (internal quotation marks omitted); *see also* 25 U.S.C. § 1901(3) (recognizing "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children").

Petitioners, the guardian ad litem, and their amici discount to the point of nonexistence both this congressional purpose and the importance to children of preserving knowledge of and ties to their tribal communities. They downplay or ignore the damaging social and psychological consequences for many Indian adoptees of being adopted out of the Indian community and raised in non-Indian cultural environments. Indeed, they go so far as to suggest that maintaining an Indian child's connection to her Tribe is not a factor that should be considered when evaluating her best interests, or even that such a connection is *adverse* to her best interests. *See, e.g.*, Guardian Br. 31 ("While the best interests standard fully protected Baby Girl[] ... ICWA simply changed the subject and protected her not at all."); Br. of Nat'l Council for Adoption in Supp. of Cert. 3 (characterizing "a child's status as an Indian tribe member or child of a tribe member" as a "compet-

ing factor" to other factors that properly define the "best interests of the child").

These troubling assertions are flatly contrary to the text and purposes of ICWA, which is "based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *Holyfield*, 490 U.S. at 50 n.24; *see also* Pet. App. 34a ("Where an Indian child's best interests are at stake, [the] inquiry into that child's best interests must also account for his or her status as an Indian, and therefore, [a court] must also inquire into whether the placement is in the best interests of the *Indian child*."). This Court should reject them.

Amici were placed for adoption before the protections of ICWA were available to Indian children, and as a result are uniquely positioned to comment on the importance of considering the maintenance of tribal ties as a significant factor among the many factors that together determine the best interests of a particular child. Although amici were adopted under a range of circumstances and have since had a broad variety of life experiences, they share one critical experience in common: Having been adopted out of their birth families' Tribes as young children, they learned of their Indian identity later in life, long after their formative years. For all, the process of recovering their tribal heritage and connecting with the greater Indian community has been transformative, and self-identification as Indian is now a critical aspect of their lives and the lives of their families. Many are now active in their Tribes and the greater Indian community, and take a personal and abiding interest in the health and perpetuation of those communities. The stories recounted in this brief are meant to provide this Court with the perspective—otherwise lacking in this case—of the children ICWA was enacted to protect.

ARGUMENT

I. ICWA Is Designed To Prevent The Separation Of Indian Children From The Indian Community Through Various Child Placement Practices, Including Voluntary Adoption

ICWA's central concern is the simultaneous protection of Indian Tribes and the best interests of Indian children. Advancing this directive requires courts adjudicating child custody proceedings to "'protect the rights of the Indian child *as an Indian* and the rights of the Indian community and tribe in retaining its children in its society.'" *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 37 (1989) (quoting H.R. Rep. No. 95-1386, at 23 (1978)) (emphasis added); *see also* 25 U.S.C. § 1902 (Congress "declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.").

As this Court observed in *Holyfield*, ICWA was addressed to an array of "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." 490 U.S. at 32. Surveying ICWA's legislative history, *Holyfield* recognized the toll such practices exacted on Indian children. *Id.* at 33 (reviewing evidence of high rates of adoption of Indians into non-Indian homes and testimony regarding the "serious adjust-

ment problems encountered by such children during adolescence, as well as the impact of the adoptions on Indian parents" (footnote omitted)). The Court likewise remarked on the considerable evidence presented to Congress concerning the destructive impact such practices had on Indian Tribes. *Id.* at 34 (quoting Chief Calvin Isaac's testimony that "the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People"). Recognizing its trust responsibility and accompanying power over Indian affairs, Congress established through ICWA "'a Federal policy that, where possible, an Indian child should remain in the Indian community.'" *Id.* at 37 (quoting H.R. Rep. No. 95-1386, at 23).

Disregarding ICWA's legislative history and this Court's decision in *Holyfield*, petitioners and their supporters assert or imply that ICWA's purposes do not extend to issues raised by *voluntary* adoptions that separate Indian children from their tribal communities. *See* Pet. Br. 16-17 (asserting that "ICWA's core purpose to prevent the involuntary removal of Indian children and dissolution of Indian families and culture is not implicated at all" in this case because it involves "the adoption of an Indian child [that was] voluntarily and lawfully initiated" by Birth Mother); Guardian Br. 55 ("When interpreted correctly, ICWA serves the legitimate purpose of preventing the involuntary removal of Indian children from their families and, in cases involving the custody of Indian children domiciled on tribal land, ensuring the tribe's ability to exercise its sovereignty over the custody proceedings."). That view should be rejected.

One purpose of ICWA was, of course, to halt practices that led to the involuntary removal of children

from their biological parents and placement in foster and adoptive homes. *See* 25 U.S.C. § 1901(4) (noting that "an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies" prior to ICWA's passage). But ICWA also responded to voluntary adoption decisions that separated Indian children from their Tribes without due consideration of the effect that separation would have on both.

By its terms, ICWA applies to "child custody proceedings" involving an "Indian child," including proceedings involving "*any* adoptive placement of an Indian child under State law." 25 U.S.C. §§ 1901(1), (4), 1915(a) (emphasis added). The statute defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *Id.* § 1903(4). The fact "[t]hat ICWA governs custody proceedings concerning children who are *eligible* for tribal membership makes apparent that Congress extended ICWA's protections to children who have not yet formed their Indian identities," including children who might be placed for adoption voluntarily. Birth Father Br. 34.

Further, as this Court noted in *Holyfield*, Congress decided to subject such placements to ICWA's jurisdictional and other provisions, even in cases where a parent consented to an adoption, because of concerns extending beyond the wishes of individual parents. 490 U.S. at 50; *see also* Hollinger, *Adoption Law and Practice* § 15.01 (1988 & Supp. 2012) ("Much of the Act concerns the removal and placement of children over the objection of a biological parent or parents. Nonethe-

less, the Act also addresses either expressly, or by implication, the voluntary placement of children by their parent(s) in foster care or with prospective adopters, and the consent by a parent to the termination of parental rights or to an adoption."). Those concerns reflected, among other things, a congressional finding that "[r]emoval of Indian children from their cultural setting seriously impacts ... long-term tribal survival and has damaging social and psychological impact on many individual Indian children." *Holyfield*, 490 U.S. at 50 (internal quotation marks omitted); *see also* 25 U.S.C. § 1901(3) (recognizing "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children").

II. ICWA Protects The Best Interests Of Indian Children By Establishing Procedural And Substantive Safeguards That Properly Protect Their Connection To Indian Tribes

The lodestar in all child-welfare proceedings is the best interests of the child. As the House Report on ICWA noted, however, quoting a decision of this Court, that "legal principle is vague, at best," and judges "'may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values.'" H.R. Rep. No. 95-1386, at 19 (quoting *Smith* v. *Organization of Foster Families for Equality & Reform*, 431 U.S. 820, 835 n.36 (1977)). Congress thus supplemented the general standard with particular content applicable to the special case of Indian children when it formulated the substantive and procedural safeguards imposed by ICWA.

First, ICWA limits the power of state courts over Indian child placement cases, directing many child custody disputes involving Indian children to tribal courts.

See 25 U.S.C. § 1911; *see also Holyfield*, 490 U.S. at 45 (noting that ICWA's "purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings").

Second, even when the custody of an Indian child is adjudicated in state court, ICWA requires that the court's analysis of the child's best interests take into account the child's connection to an Indian Tribe. ICWA's notice and appointment of counsel provisions ensure that state-court decisions are informed by the perspective of Indian parents and Tribes. 25 U.S.C. § 1912(a), (b). ICWA also seeks to prevent improvident termination of parental rights in cases involving an Indian child by requiring that the party seeking termination "satisfy the court that active efforts have been made to provide remedial services" to the Indian family and that such efforts have "proved unsuccessful." *Id.* § 1912(d). ICWA further circumscribes the discretion of state courts by requiring that terminations of parental rights be "supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(f).[2] Moreover, as the South Carolina Supreme

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[2] ICWA provides heightened protections designed to preserve the child's relationship with her biological family and her tribe even when such preservation efforts may thwart the desires of would-be adoptive parents. Thus, in cases in which an Indian parent voluntarily consents to the termination of parental rights and an adoption, ICWA provides that such consent "may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption." 25 U.S.C. § 1913(c). Even a final decree of adoption may be vacated for up to two years upon a showing that the consent was obtained through fraud or duress. *Id.* § 1913(d).

Court recognized, ICWA requires that a state court's "inquiry into that child's best interests must also account for his or her status as an Indian, and therefore ... must also inquire into whether the placement is in the best interests of *the Indian child*." Pet. App. 34a (citing 25 U.S.C. § 1902); *see also id.* at 35a ("Baby Girl, as an Indian child, has a strong interest in retaining ties to her cultural heritage.").

Further, in cases in which an Indian child is adopted, ICWA ensures that a state court's discretion in discerning the child's best interests is cabined by the articulated national policy favoring the placement of Indian children in Indian families and tribal settings. Specifically, ICWA establishes that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). Together with ICWA's other protections, Section 1915(a)'s placement presumption "establish[es] a Federal policy that, where possible, an Indian child should remain in the Indian community." H.R. Rep. No. 95-1386, at 23. At the same time, as the House Report noted, Section 1915(a) "is not to be read as precluding the placement of an Indian child with a non-Indian family." *Id.* The "good cause" exception provides state courts flexibility to accommodate other interests in appropriate cases. That flexibility is essential to ICWA: Section 1915(a) creates "a strong presumption that will control in the vast majority of cases," while providing a "safety valve" for cases with compelling reasons to depart from those preferences, and thus "ensures that the ultimate custody decision reflects the child's best interests." Cherokee Nation Br. 19.

ICWA's insistence that Indian children should, if possible, be placed with their biological families or other members of their Tribe reflects Congress's determination that such placements would spare many Indian adoptees the potentially damaging social and psychological consequences of being adopted out of the Indian community and raised in non-Indian cultural environments. H.R. Rep. No. 95-1386, at 9 (noting that "most Indian children in placement or in institutions have to cope with the problems of adjusting to a social and cultural environment much different than their own"); *Holyfield*, 490 U.S. at 49-50 ("Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture.").

Petitioners and their supporters seek to downplay these concerns. They go so far as to suggest that maintaining an Indian child's connection to her Tribe is not a factor that should be considered when evaluating her best interests, or even that considering the interests of the birth parent and the Tribe "*preclude[s]* an honest assessment" of the child's best interests. Child Advocacy Organizations Br. 15; *see supra* p. 3.[3] Such arguments, however, fail to recognize (or are actively hostile to) a basic premise of ICWA: The preservation of

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[3] To be clear, amici do not suggest that otherwise inappropriate child placements or adoptions ought to be consummated, to the detriment of the child, simply because a birth parent is Indian. Nothing in ICWA requires that result. Amici only stress that in their experience—which is consistent with Congress's determinations in enacting ICWA—the recognition and acceptance of a child's tribal heritage during her formative years is highly significant to the development of the child's identity, and therefore entitled to substantial weight in determining whether a particular placement serves the overall best interests of the child.

an Indian child's connection to her Tribe generally *is* in her best interests. Affording state courts unbridled discretion to impose their own views of what is in an Indian child's best interests will fail to protect those interests as Congress, after considerable study, understood them.

Here, the South Carolina Supreme Court interpreted ICWA consistently with the statute's text and purposes and with this Court's decision in *Holyfield*. First, the court correctly rejected petitioners' argument that "any efforts to rehabilitate Father would be futile," because Section 1912(d) plainly "requires that remedial services be offered to address any parenting issues to prevent the breakup of the Indian family," and because Birth Father's steadfast determination to be a parent to Baby Girl throughout the litigation belied any futility argument. Pet. App. 26a-27a. Second, the court properly recognized that Adoptive Couple failed to "prov[e] that Father's custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt" as required by Section 1912(f). *Id.* at 29a. To the contrary, Father "and his family have created a safe, loving, and appropriate home for her." *Id.* at 32a. Third, the court correctly held that placement with Birth Father is in Baby Girl's best interests. As the court noted, Adoptive Parents failed to present any evidence that "Baby Girl would not be safe, loved, and cared for if raised by Father and his family." *Id.* at 37a. Moreover, the court found that "in transferring custody to Father and his family, Baby Girl's familial and tribal ties may be established and maintained in furtherance of the clear purpose of the ICWA." *Id.* Finally, the court correctly held that, even if Birth Father's rights were terminated, Adoptive Couple had failed to demonstrate good cause for deviat-

ing from the placement preferences in Section 1915(a), which Birth Mother sought to subvert "[f]rom the outset" by seeking "placement in a non-Indian home." *Id.* at 38a.

The South Carolina Supreme Court's recognition that protecting the best interests of an Indian child requires accounting for her status as an Indian is consistent with the views of numerous state courts and commentators. *See, e.g., In re Esther V.*, 248 P.3d 863, 876 (N.M. 2011) ("While an abuse and neglect proceeding is designed to protect the best interests of the child and the rights of the parents, ICWA goes further by protecting the unique relationship between a tribe and its children. That relationship is not to be severed casually or without good cause."); *In re C.H.*, 997 P.2d 776, 782 (Mont. 2000) ("ICWA expresses the presumption that it is in an Indian child's best interests to be placed in conformance with the preferences" of Section 1915(a)); *In re Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994) ("ICWA appears to create a presumption that placement of Indian children within the preferences of the Act is in the best interests of Indian children."); *Navajo Nation* v. *Arizona Dep't of Econ. Sec.*, 284 P.3d 29, 34-35 (Ariz. Ct. App. 2012), as amended (Sept. 5, 2012) ("[A]bsent other factors amounting to good cause to deviate from ICWA preferences, keeping a Native American child with his or her community and tribe is presumed to be in the best interests of the child as well as the tribe and community."); *see also* Jones et al., *The Indian Child Welfare Act Handbook* 4 (2008) (in passing ICWA, "Congress clearly felt that maintaining Native American children in homes that reflect the children's unique native cultures and values would be in their 'best interest' and the best interest of Indian tribes").

III. AMICI'S PRE-ICWA ADOPTION EXPERIENCES DEMONSTRATE THAT MAINTAINING TRIBAL TIES SERVES THE BEST INTERESTS OF AN INDIAN CHILD

Amici were placed for adoption before 1978, when ICWA began to change the way child placement decisions for Indian children were rendered. Some amici enjoyed happy childhoods with their adoptive families; others did not. That range of experiences is not unique to Indian adoptees. What distinguishes amici's experiences is instead a shared sense of alienation and dislocation occasioned by being Indian children raised in families and communities apart from their Tribes. This experience was common to those with happy and unhappy adoptive family situations alike. Even loving and attentive adoptive parents may sincerely believe that they must, in the words of one adoptive parent, "kill the Indian to save the man."

Amici at different points in their lives learned of their tribal affiliations and worked to recover connections to their Tribes and the greater American Indian community. That often difficult process affected the self-discovery and fulfillment that ordinarily occur naturally for children raised in families and communities with particular cultural, social, and spiritual traditions. For each amicus, the process of recovering his or her tribal roots has been transformative but bittersweet.

1. Several of the amici were voluntarily placed for adoption by their birth mothers. The experience of Diane Tells His Name is exemplary. Having learned at the age of 37 that she was voluntarily placed for adoption by her birth mother as an infant, Tells His Name avidly pursued her birth family's roots. She is now a member of both the Daughters of the American Revolution on her birth father's side, and the Oglala Sioux

Tribe on her birth mother's. But long before she discovered both that she was adopted and that she was Indian, she had felt inexplicably drawn to Indian culture, an interest that her otherwise loving and supportive adoptive parents actively discouraged. Tells His Name speculates that they did this because they knew she was Indian and worried about what a recognition of that identity would mean for her and for their family.

When she discovered that her birth mother was Indian, Tells His Name began to immerse herself in her Lakota (Sioux) heritage, which is now at the center of her and her family's life. She underwent a naming ceremony and became an enrolled member of the Oglala Sioux Tribe. She has served as a foster parent for Indian children, and her two daughters and eight grandchildren are all now enrolled members of her Tribe. She credits their tribal enrollment with much of her children and grandchildren's academic success and personal growth. When her adoptive parents died, however, she was written out of their will because, in their words, she had gone "back to the blankets"—a reference to her embrace of her Indian heritage. Tells His Name explains that she was sustained through this rejection by her new relationship with her birth mother (with whom she had reconnected), and by her new involvement in tribal life.

The experiences of other amici follow a similar pattern. Tonya May Deal, a member of the Pyramid Lake Paiute Tribe, was born in 1952 on an Indian reservation in Nevada to a mother aged 14 and father aged 18. She was placed for adoption by her birth mother and adopted by a non-Indian family in Salt Lake City, Utah, when she was two-and-a-half years old. Throughout her childhood, her adoptive family taught her to reject her Indian heritage; her adoptive mother used to joke

that if she misbehaved, the family would "leave you on the reservation." After feeling a sense of shame for many years about her heritage, Deal enrolled in the Pyramid Lake Tribe five years ago, and has become proud of the history of her people, who were hard-working farmers—a contrast with the image of her family and people as depicted by her adoptive parents. Deal feels that she was "robbed" of her childhood, and that she lost out on the opportunity to learn as a young woman about the religious and artistic traditions of her Tribe. Her adult son and daughter are both now members of her Tribe, and her son's children are being taught about the traditions of their Tribe.

Tara (Pretends Eagle) Weber, a member of the Standing Rock Lakota Tribe, was born in 1969 in Cleveland, Ohio. Her birth mother, who was 18 years old when Weber was born, grew up on a reservation in North Dakota and ended up in Cleveland through a government relocation program. Weber's understanding is that her mother voluntarily placed her for adoption, and she was adopted by non-Indian parents who encouraged her to learn about her heritage and helped her become an enrolled member of her Tribe. Despite their supportive attitudes, Weber felt anxiety, depression, and shame as a child and young woman who was "never around anyone who looked like me" and who was often teased about her appearance. She felt an overwhelming sense that she did not belong, and that there was no one in her life "to show me who I was" and to teach her how to be "a Lakota girl."

At age 30, Weber moved to California to work for the National Indian Justice Center, in the hope that through working with Indians she would "find out who I was and where I came from." Her work led her to reconnect with her Tribe; indeed, she recounts that just

sitting in a room of Indians gave her a sense of ease and happiness. Weber has also reconnected with her birth family. Although her relationships with her birth mother and sisters have been painful and difficult at times, Weber describes them as "healing journeys in progress."

Meschelle Linjean was born to a seventeen-year-old Cherokee mother and adopted by a non-Indian family in 1970. Because she was raised by her adoptive parents in Cherokee country, she grew up near other Indians. Linjean's "peripheral exposure to Native culture" made her passingly familiar with Indian traditions and mores, but her adoption by non-Cherokee parents deprived her of a sense that she formed a genuine part of the Cherokee community. Thus, even though Linjean's adoptive father encouraged her to be proud of her Indian heritage, he was unable to provide her with the knowledge and understanding necessary to do so. Nor could Linjean's adoptive mother or stepmother (who was herself a Seneca Indian) bridge the gap between Linjean and the Cherokee Nation.

At age 20, Linjean began the process of finding her birth family and affiliating with her Tribe. Reconnecting with her birth Tribe after being raised outside the tribal community was a formidable process. As Linjean explains it, while she had long felt a diffuse kinship with other Indians, she "didn't know the customs, the language, the inside jokes, the ceremonies. I was aware that I was Indian, but I didn't know what I was supposed to do as an Indian." Soon after meeting her birth family, Linjean moved to the Cherokee Nation for a few years to be near her birth mother and her sisters. While there, she also took college courses in Cherokee language and culture; those courses were helpful, but they "could not substitute for the natural knowledge I

would have had if I had grown up within my culture." Linjean has also become an active participant in the community of "returning adoptees"—other Indians who were adopted into non-Indian homes. These fellow returning adoptees share Linjean's lifelong "sense of isolation, and of not belonging," and have assisted her in "becoming more complete."

2. Other amici were involuntarily removed from their birth families and adopted by non-Indians. They too felt a sense of alienation from their heritage, and spent many years as adults struggling to reconnect with their birth families.

After Leland Pacheco Morrill's birth mother died in 1968, when he was two years old, Morrill went to live with his grandmother. He was then removed from her custody and placed for adoption after he was injured in a fire. Morrill and his adopted Indian siblings were raised by a non-Indian Mormon family, principally in Canada and South Dakota, and were always the only non-white children in school. He was first exposed to Indian culture in college, and soon after recovered his Navajo heritage. When he reconnected with his grandparents, he was dismayed that he was unable to communicate with them because they spoke only Navajo. Nonetheless, his interest in his cultural heritage deepened as he grew older. Morrill gave up his job at the Federal Reserve Bank to pursue the traditional vocation of his birth father's family—silversmithing—and enrolled in the Navajo Nation. He now lives in California and is an active participant in tribal life. He believes, however, that no current, adult affiliation can adequately compensate him for the loss of a traditional upbringing and early education in the ways of his Tribe.

Similarly, Sandy White Hawk was born in 1953 on the Rosebud Reservation in South Dakota to Sioux birth parents. She was involuntarily removed from her birth parents by a social worker and placed with adoptive parents, who kept her away from her relatives and told her that her mother "only wanted you so she could have a welfare check and she could drink." In view of her adoptive parents' antipathy for Indians, White Hawk often felt as a child that she did not understand Indians or Indian culture. Her family eventually relocated to southern Wisconsin, where she spent most of her childhood feeling emotionally isolated from her adoptive family and their community. When she grew older, she reconnected with her mother's family and learned that her cousin Doris—who maintains a stable home and who helped raise several of White Hawk's other cousins whose parents were struggling—would have raised White Hawk, too, if White Hawk had not been removed by social workers.

3. Feelings of dislocation and alienation are not limited to Indian children adopted by non-Indian parents. Even adoption by a loving family affiliated with a different Tribe may well disrupt an Indian child's connection to her own tribal culture.

Patina Park was born in 1970 in Fargo, North Dakota. Her birth mother was white, and her birth father was a member of the Cheyenne River Sioux Tribe. Park's maternal grandparents were very unhappy that her birth father was Indian, and they pressured her mother to place her for adoption. About one month after her birth, Park was adopted by a non-Indian mother and a father who was an enrolled member of the Osage Nation. Park's adoptive parents were told by the agency that handled her adoption that the Cheyenne River

Sioux wanted nothing to do with her because she had mixed blood.

Park loved her adoptive parents, but she never felt any sense of community with Osage Indians. In her early 40s, she reconnected with her biological family, and learned for the first time that her paternal birth grandmother had wanted to raise her but was unable to track down Park's birth mother before the adoption. Park believes that if ICWA's notification procedures had been in place at the time of her birth, they would have ensured that she was raised within her Tribe. While she appreciates her current connection with the Indian community in Minneapolis, where she runs a direct services organization for Indians, she feels a profound sense of loss about having missed out on a childhood within her Tribe, and that loss has, in her words, left "a permanent hole in my soul."

* * *

These stories capture a few voices from among the thousands of Indian children who were placed in homes and communities outside their Tribes before ICWA checked the often unjustified outflow of Indian children from their birth families and tribal communities. Amici make no claim that their personal narratives tell the full story of all pre-ICWA Indian adoptees. Their stories, however, resonate with Congress's avowed intent to help secure the survival of Indian Tribes and the tribal identity of individual Indian children by ensuring that courts consider tribal affiliation when determining the best interests of every Indian child.

CONCLUSION

The judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

LIST OF AMICI CURIAE

Tonya May Deal, born in Nevada in 1952 and adopted in 1955, is enrolled in the Pyramid Lake Paiute Tribe.

Meschelle Linjean, born and adopted in Oklahoma in 1970, is enrolled in the Cherokee Nation.

Leland Pacheco Morrill, born in Arizona in 1966 and adopted in 1971, is enrolled in the Navajo Nation.

Patina Park, born and adopted in North Dakota in 1970, is in the process of enrolling in Cheyenne River Sioux Tribe.

Diane Tells His Name, born in Oklahoma in 1951 and adopted in 1952, is enrolled in the Oglala Sioux Tribe.

Tara (Pretends Eagle) Weber, born and adopted in Ohio in 1969, is enrolled in the Standing Rock Sioux Tribe.

Sandy White Hawk, born in South Dakota in 1953 and adopted in 1955, is enrolled in the Rosebud Sioux Tribe.

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ADOPTIVE COUPLE

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION

Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF FOR THE AMERICAN ACADEMY OF ADOPTION ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The American Academy of Adoption Attorneys (Academy) is a not-for-profit organization of attorneys, judges and law professors throughout the United States and Canada, who have distinguished themselves in the field of adoption law and who are dedicated to the highest standards of practice.[1] The Academy's mission is to support the rights of children to live in safe, permanent homes with loving families, to protect the interests of all parties to adoptions, and to assist in the orderly and legal process of adoption. The Academy's work includes promoting the reform of adoption laws and disseminating information on ethical adoption practices. The Academy regularly conducts seminars on the Indian Child Welfare Act (ICWA) and the rights of birth parents and children for attorneys and the judiciary. The Academy has been or is actively involved in legislative efforts to amend ICWA and to establish federal protections for birth parents.

SUMMARY OF THE ARGUMENT

This case calls for the Court to clearly set forth the constitutional rights of children in relationship to the statutory rights created by the Indian Child Welfare Act (ICWA) and clarify that the best interests of the child is the paramount focus of ICWA. *Adoptive*

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirm that no counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* and their counsel made such monetary contribution. Pursuant to this Court's Rule 37.3, counsel of record for both petitioners and respondents received timely notice of *amicus*' intent to file this brief and all parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

Couple v. Baby Girl[2] vitiates the sixty year evolution of federal and state legislation and jurisprudence in which the states developed laws protecting the rights of fathers, mothers, and children in adoption including abusive manipulation of pregnant women. Abrogating these evolved state laws undermines the cooperative federalism in which states have historically earned federal deference to state family laws.

ARGUMENT

I. THE PARAMOUNT FOCUS OF ICWA IS THE BEST INTERESTS OF THE CHILD

This case presents an opportunity to clearly establish that in cases involving ICWA, as under state laws, the best interests of the child is the paramount focus of ICWA. For example, as the Nebraska Supreme Court stated "[t]he Indian Child Welfare Act does not change the cardinal rule that the best interests of the child are paramount . . . ." *In re Bird Head*, 331 N.W.2d 785, 791 (Neb. 1982).

The Alaska Supreme Court, too, has summarized this issue in several ICWA cases. For instance, in *In re Adoption of Bernard A.*, the Alaska Supreme Court stated:

> It is the duty of the trial court to move cases expeditiously and to rule in the best interest of the child, and the perceived fairness of the result to the adults involved is necessarily of secondary, and far less, importance than the best interests of the child. As one expert in the case put it, the question is where the child's best interests lie, not which of the applicants is the most deserving.

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[2] 731 S.E.2d 550 (S.C. 2012).

77 P.3d 4, 9 (Alaska 2003). In *C.L. v. P.C.S*, the court stated: "We recognize that child adoption proceedings are highly context-sensitive, and that different adoption cases will vary factually. As we have stated previously, the best interest of the child must be paramount in these proceedings." 17 P.3d 769, 776 (Alaska 2001). As this Court has stated:

> The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida mandates that custody determinations be made in the best interests of the children involved. The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.

Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (citation omitted).

While many state courts have stated that the best interests of the Indian child is the paramount focus of ICWA, it is important that this Court clearly and forcefully clarifies that ICWA does not lessen this substantial governmental interest. See *L.G. v. State Dept. of Health and Soc. Servs.*, 14 P.3d 946, 955 (Alaska 2000) (citation omitted); *In re Adoption of F.H.*, 851 P.2d 1361, 1363-1364 (Alaska 1993); *In re Appeal in Maricopa Cnty. Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Ariz. Ct. App. 1983); *In re A.N.W.*, 976 P.2d 365, 369 (Colo. App. 1999); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 308 (Ind. 1988); *In re* A.E., 572 N.W.2d 579, 583-585 (Iowa 1997); *In re Adoption of B.G.L.*, 133 P.3d 1, 10 (Kan. 2006); *In re Adoption of M.*, 832 P.2d 518, 522 (Wash. Ct. App. 1992).

II. A CHILD'S CONSTITUTIONAL RIGHT TO A STABLE, SAFE AND PERMANENT HOME

This case calls for the Court to clearly recognize a child's constitutional right to remain in a stable, safe and permanent home, to find that ICWA does not dilute state law regarding the protection of children, and to find that ICWA does not make the child's needs a secondary consideration to the rights of an Indian tribe or parent.

This Court has recognized that "because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

Children are not simply chattel belonging to a parent, but have a fundamental interest of their own that may diverge from parental interests. *In re Guardianship of Victoria R.*, 201 P.3d 169, 174 (N.M. Ct. App. 2008) (citing *In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994)).

As an Iowa appellate court stated:

> While ICWA focuses on preserving Indian culture it does not do so at the expense of a child's right to security and stability.

In re C.A.V., 787 N.W.2d 96, 104 (Iowa Ct. App. 2010).

What is glaringly absent in the South Carolina Supreme Court's decision, as well as many state appellate decisions, is recognition of the Indian child's rights. Tribal advocates may argue that the tribe's interest includes the Indian child's interests; such a position is untrue when a tribe uproots a child

firmly bonded to parent figures over extended time periods. It is clear that the outcomes of these cases have profound impacts upon the Indian children's future and familial upbringings. While it is a well-established legal principle that children have constitutionally protected rights, this is often overlooked in ICWA cases. As this Court has stated "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13 (1967). The Supreme Court has long recognized that children have constitutionally protected rights and liberties. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

Indeed, in *Troxel v. Granville*, the Court's majority took exception to Justice Stevens' dissent and stated "[C]ontrary to Justice Stevens' accusation, our description of state nonparental visitation statutes . . . is not meant to suggest that 'children are so much chattel.'" 530 U.S. 57, 64 (2000). State court decisions have recognized the fundamental right of the child to be protected from neglect and to have a "placement that is stable, permanent, and which allows the caretaker to make a full emotional commitment to the child." *In re Marilyn H.*, 851 P.2d 826, 833 (Cal. 1993). The Academy urges the Court to seize this opportunity to finally clarify a child's rights in these highly contested cases.

III. Evolution of Federal Legislation and Jurisprudence on Birth Parent Rights

This dispute revolves around whether Father has rights to withhold consent to the adoption of Baby Girl. A biological father with such rights is called a "parent," "presumed father," or "consent father." Although the South Carolina Supreme Court's

majority and dissenting opinions held that Father automatically waived his consent rights under South Carolina law, it trumped its state law on Father's consent rights with an erroneous application of ICWA. See *Adoptive Couple*, 731 S.E.2d at 561; 731 S.E.2d at 669 (Kittredge, J., dissenting); S.C. CODE ANN. § 63-9-310(A)(5) (2012). This vitiated decades of federal and state legislation and jurisprudence that protects and balances constitutional rights of unwed fathers, their children, and their mothers.

Non-marital children comprised 40.8% of American births and 65.6% of American Indian births in 2010 – a substantial increase compared with 33.2% of American births in 2000.[3] See CDC, *Births: Final Data for 2010*, 61 Nat'l Vital Statistics Reports 1, 45 (2012), http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf; CDC, *Births: Final Data for 2000*, 50 Nat'l Vital Statistics Reports 1, 9 (2002), http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_05.pdf. While the mother of a child is made clear by birth, identity of the father of a child with no presumptive father[4] is obscure and has historically depended upon mothers' identification. Distinguishing who constitutes a consent father under state law is complicated by the father who would mistreat the mother, avoid identification, and shun parental responsibilities like financial support. Such a father is at the heart of the instant case.

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[3] Data on American Indian births was not documented in 2000.

[4] A father with consent rights if often called a "presumed father," which typically means a man who is married to the mother, or has invalid marriage to the mother, or who has otherwise legally established his paternity to a child. UNIF. PARENTAGE ACT §§ 102(17), 204 (2000).

The good cause exception found in Congressional child support legislation, along with the *Stanley, Quilloin, Caban, Lehr, Roberts* and *Troxel* opinions, lay out a "biology plus" constitutional template for states to develop laws defining rights of unwed fathers commensurate with responsibilities assumed. *Rose*, *Troxel*, and *Michael H.* created the expectation that states' laws would control if they followed the template. The ICWA definition of unwed father is consistent with the template and the states' expectations.

The evolution of unwed father law began in 1950 when Congress first enacted legislation requiring states to enforce child support – a requirement necessarily dependent upon mothers identifying fathers of nonmarital children. This effort addresses the fact that nonmarital children are more likely to live in poverty, do poorly in school and experience emotional and behavioral problems. See CARMEN SOLOMON-FEARS, CONGRESSIONAL RESEARCH SERV., REPORT FOR CONGRESS (RL34756) – NONMARITAL CHILDBEARING: TRENDS, REASONS, AND PUBLIC POLICY INTERVENTIONS 4 (2008).

In 1972, when common law historically provided unwed fathers with no parental rights or obligations, this Court, citing a violation of due process and equal protection, struck down an Illinois law affording an unwed father no hearing in the dependency case of his children with whom he and their mother had lived until she died. See *Stanley v. Illinois*, 405 U.S. 645, 646, 658 (1927). With *Stanley*, the Supreme Court and Congress ideologically converged to compel and guide states to define the status of "parent" for unwed fathers.

In 1974, Congress "created specific state requirements for establishing paternity and child support . . . . and established the cooperation requirement" explicitly requiring mothers to identify unwed fathers. Jacqueline M. Fontana, *Cooperation and Good Cause: Greater Sanctions and the Failure to Account for Domestic Violence*, 15 WIS. WOMEN'S L.J. 367, 372 (2000); accord Social Services Amendments of 1974, Pub. L. No. 93-647.

In 1975, Congress enacted a good cause exemption to the cooperation requirement if identifying fathers for child support purposes would "subject the child or mother to substantial danger or physical harm or undue harassment." 121 CONG. REC. H7141 (daily ed. July 21, 1975) (statement of Rep. James Corman); see also Mary R. Mannix, *et al.*, *The Good Cause Exception to the AFDC Child Support Cooperation Requirement*, 21 CLEARINGHOUSE REV. 339, 339 (1987-88). The exemption recognized the interplay among domestic violence, unwed biological fathers, and child support and implicitly protected mothers' safety and privacy interests. The Personal Responsibility and Work Opportunity Act of 1996 maintained a state's freedom to waive mothers' required identification of fathers when screening for domestic violence. See 42 U.S.C. § 602(a)(7)(A)(iii) (2006).

In 1977, in response to *Stanley*, New York developed the first putative father registry. See N.Y. SOC. SERV. LAW § 372-c (McKinney 2013); see also *Lehr v. Robertson*, 463 U.S. 248, 251 (1983). Unwed fathers without consent rights could mail a postcard to the registry to protect their rights to notice in adoption but failure to register within thirty days of birth waived notice. *Id.* at 264. New York unwed fathers could otherwise protect these rights by

acknowledging or adjudicating paternity, marriage or invalid marriage to the mother, or assuming the responsibilities of parenting. *Id.* at 251.

In 1978, this Court upheld a Georgia law allowing a "best interests of the child" standard to trump the rights of an unwed father in the stepparent adoption of his school age son. See *Quilloin v. Walcott*, 434 U.S. 246, 254 (1978). Father had not legitimated the child, never taken custody of him, nor shouldered significant responsibility for him. *Id.* at 256. This case marks the seeding of "biology plus." See Daniel C. Zinman, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971, 976 (1992) ("Quilloin thus established that an unwed father must have more than a biological link with his child to receive constitutional protection of his parental rights – he must participate in the care of his child and accept responsibility for his child's well being.").

In 1979, this Court struck down a New York law withholding the right to consent to adoption from an unwed father who had actively reared his two young children. See *Caban v. Mohammed*, 441 U.S. 380, 394 (1979). "Biology plus" endured. In his dissent, Justice Stevens accurately predicted that states would revise their adoption statutes in light of the Courts' holdings in these cases. *Id.* at 417 (Stevens, J., dissenting).

Four months after *Caban*, North Dakota cited *Caban* in upholding the termination of parental rights of an unwed father who had not assumed parental responsibilities. See *In re F.H.*, 283 N.W.2d 202, 207 (N.D. 1979). Twelve months later, Missouri cited *Caban* in an adoption decision excusing a mother from identifying an unwed father who had

not protected his constitutional rights by asserting his paternity in the adoption of a newborn. See *State* ex rel. *T.A.B. v. Corrigan*, 600 S.W.2d 87, 93-94 (Mo. Ct. App. 1980). Thus, states promptly incorporated Supreme Court jurisprudence in defining and protecting rights of fathers in adoptions commensurate with their acceptance of responsibilities, including prenatal responsibilities, and in relieving mothers of responsibility for naming fathers.

In 1983, this Court upheld New York's registry against a man who had not received notice of the stepparent adoption petition filed for his daughter. *Lehr*, 463 U.S. at 267. Mr. Lehr had not filed with New York's putative father registry, had not supported his daughter, had rarely visited her, and filed an action to establish his paternity after the stepparent adoption was filed. *Id.* at 252. This Court's famous words have guided the states to distinguish presumed fathers with constitutionally protected rights to consent to adoption:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of the responsibility for the child's future, he may enjoy the blessings of the parent-child relationship . . . . If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

Id. at 262.

While registries passed constitutional muster and provided a bright line rule to identify those fathers with and without notice and consent rights, *Lehr* also

created an exception to the registry law to protect certain unregistered fathers imbued with consent rights. The Court noted that: "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood . . . his interest in personal contact with his child acquires substantial protection under the due process clause." *Id.* at 261. The Court defined "full commitment" when it described what Mr. Lehr did not do: "[Lehr] has never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old." *Id.* at 262. This sentence gave birth to the state standards for the "plus" in "biology plus."

Lehr also discussed mothers of nonmarital children and the adoption process. This Court found that New York's conclusion that "a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees," was not arbitrary. *Id.* at 264. In the accompanying footnote[5], *Lehr* referenced *Roe v Norton*, in which this Court vacated a Connecticut contempt judgment against unmarried mothers receiving AFDC assistance who failed to name the fathers of their children and cited Public Law 93-647. See *Roe v. Norton*, 422 U.S. 391 (1975). Public Law 93-647 authorized state grants for child support and paternity establishment and listed preventing abuse of children and adults as its third purpose. See Social Services Amendments of 1974, Pub. L. No. 93-647. This linked the privacy

[5] *Lehr*, 463 U.S. at 264 n.21.

rights of mothers in withholding fathers' names to abuse.

Thus, *Lehr* announced the standard for constitutional protection for unwed fathers who had not established paternity nor filed with state registries, upheld registries and their time limitations, affirmed the privacy rights of mothers, and recognized the nexus between such rights and abuse.

In 1987, this Court decided *Rose v. Rose* in which state ordered child support was found payable from a veteran's benefits. See 481 U.S. 619, 636 (1987). This Court announced that "the whole subject of the domestic relations of . . . parent and child, belongs to the laws of the States and not to the laws of the United States" as long as it does not "do major damage to clear and substantial federal interests." *Id.* at 625 (citation omitted). The Court related the exception to Supremacy Clause pre-emption to obligations that had deeply rooted moral responsibilities and to complicated and established state procedures. *Id.* at 625, 632. Parent-child relationships and child/prenatal support statutes define individualized moral obligations and properly belong to the states.

Consistently, in 1989, this Court upheld a California statute that honored a presumed father's paternal status over a biological father's genetic paternity. See *Michael H. v. Gerard D.*, 491 U.S. 110 (1989). This holding confirmed the federal tradition deferring to states' laws on determination of parentage. *Id.* at 131-32.

In 1992, this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* recognized the interplay of domestic violence of mothers by

fathers, financial abuse, and pregnancy when it stated that "[t]he number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy." See 505 U.S. 833, 889 (1992). The Court also noted that the "[m]ere notification of pregnancy is frequently a flashpoint for battering." *Id.* The Court discussed fathers' control over finances to deprive women of necessary monies for herself or her children and recognized the connection between domestic violence and women's communications about pregnancy with fathers. *Id.* at 893.

In 2000, this Court's decision in *Troxel v Granville* evinced unanimous agreement that custodial parents have a constitutional right to care for, nurture, and educate a child. See 530 U.S. 57, 65-66 (2000). The plurality and dissents cite a combination of *Stanley, Quilloin* and *Lehr* in defining the boundaries of that liberty interest as it is not an enumerated constitutional right and bears state definition "elaborated with care." *Id.* at 65-66, 73 (citation omitted); *id.* at 93 (Scalia, J., dissenting); *id.* at 95 (Kennedy, J., dissenting); accord *DeSylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (deeming state law controlling in laws defining children).

Ten months after *Quilloin*, Congress enacted ICWA in November 1978 with its definition of parent which "does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9) (2006). ICWA's definition was consistent with the evolving definition of unwed fathers and is best understood within the then current lens of both Congress's push for paternity establishment and financial responsibility from unwed fathers and this Court's emerging "biology plus" jurisprudence

making rights commensurate with responsibilities assumed. This is consistent with ICWA legislative history that indicated that the ICWA definition of "parent" "was not meant to conflict" with the Supreme Court's decision in *Stanley* and not meant to create a new category of father. H.R. REP. NO. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7543.

Within five years, state courts were applying their own definitions of parent to determine if an unwed father had protected his constitutional rights involving his child in ICWA cases. See Motion for Leave to File Brief as *Amici Curiae* and Brief of Professor Joan Heifetz Hollinger, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (2012) (No. 12-399), 2012 WL 5375610 at *14-15.

IV. *LEHR* PRECIPITATED DECADES OF STATE LAWS AND JURISPRUDENCE

The states' definitions of which fathers have consent rights in adoption are highly developed in line with this Court's "biology-plus" jurisprudence, and they include the *Lehr* standard, paternity registries, and prenatal abandonment laws. Congress has contemplated a national father registry in line with this Court's jurisprudence to connect the states in their efforts to distinguish consent fathers. Allowing *Adoptive Couple's* application of ICWA to undo such legislation for children voluntarily placed for adoption by non-Indian mothers where state law waives fathers' consent rights frustrates state and federal legislation, jurisprudence, and public policy for nonmarital children. Such public policy includes paternity establishment, prenatal child support, mothers' decisions on parenting/abortion/adoption,

protecting mothers from abuse and homicide, and reducing contested litigation destabilizing adoptive placements.

Lehr vetted "biology plus," and states immediately began reforms to protect consent rights of those fathers who met *Lehr's* standard and/or had established paternity. One year later, Louisiana cited *Lehr's* standard of full commitment to parental responsibilities in determining an unwed father's rights. See *Durr v. Blue*, 454 So.2d 315, 319 (La. Ct. App. 1984). Thirty years later, at least forty-one states report cases using the father's commitment to parenting as a standard to determine consent rights in adoption. See Ardis L. Campbell, Annotation, *Rights of Unwed Father to Obstruct Adoption of His Child by Withholding Consent*, 61 A.L.R. 5th 151 (1998). However, evincing a parental commitment is not the only way a father can protect his rights to notice, to be heard, and to consent in adoption. *Lehr*, 463 U.S. 248 at 251; e.g., *In re C.J.S.*, 903 P.2d 304, 306-07 (Okla. 1997).

The bright line rules of putative father registries and prenatal abandonment more easily distinguish those biological fathers with and without consent rights and advance the orderly processing adoptions, particularly of newborns.

Registries and prenatal abandonment laws place the burden on fathers to act affirmatively to protect their rights rather than putting pregnant women in a supplicant position vulnerable to the abuse recognized in *Planned Parenthood* by consigning mothers to both identify fathers and solicit their support. A number of states either relieve mothers of identifying unwed fathers who have "mere" biological links and no relationship with the children or provide

that intercourse serves as notice of pregnancy for purposes of adoption. See *Evans v. South Carolina Dep't of Soc. Serv.*, 399 S.E.2d 156, 157 (S.C. 1990); *State ex rel. T.A.B. v. Corrigan*, 600 S.W.2d 87; MO. REV. STAT. § 453.061 (2004); S.C. CODE ANN. § 63-9-820 (2012); WIS. STAT. § 48.24 (2012); VA. CODE ANN. § 63.2-1250 (2012); see also Campbell, *Rights of Unwed Father to Obstruct Adoption*, supra at § 15(b); Mary Beck, *Toward A National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL'Y 1031, 1050 nn.76-77 (2002).

No consensus exists on the number of states with putative father registries because not all registries provide all protections. See Dale J. Gilsinger, Annotation, *Requirements and Effects of Putative Father Registries*, 28 A.L.R.6th 349 § 2 (2007) (noting the variety of protective procedures); Compare CHILD WELFARE INFO. GATEWAY, U.S. DEPT. OF HEALTH AND HUMAN SERV., THE RIGHTS OF UNMARRIED FATHERS 3 (2010), http://www.childwelfare.gov/systemwide/laws_policies/statutes/putative.cfm, with Mary Beck, *A Nat'l Putative Father Registry*, 36 CAP. U. L. REV. 295 app. at 339 (2007).[6] Effective putative father registries ensure notice to the father who registers within the state's time limit and provide consequences for failure to timely file. See Beck, *A Nat'l Putative Father Registry*, supra, at 301-02. While the consequences vary, states typically waive a father's rights to withhold consent to adoption but also create exceptions for fraud. See e.g., Gilsinger, *Requirements and Effects*, supra at §§ 8-10; MO. REV. STAT. § 192.016.7(1) (2012). *Jeremiah J. v Dakota D.*, is the

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[6] None of these lists contains South Carolina's registry found at S.C. CODE ANN. § 63-9-820 (2012).

latest reported case regarding birth mother fraud. See 285 Neb. 211 (2013).

Putative father registries have been widely litigated and are uniformly found constitutional under *Lehr*'s template. See Gilsinger, *Requirements and Effects*, supra at § 2; e.g., *In re C.M.D.*, 287 S.W.3d 510, 516 (Tex. App. 2009). Courts have upheld putative father registration timelines in protecting the states' interests in promptness. See *Heidbreder v. Carton*, 636 N.W.2d 833, 840 (Minn. Ct. App. 2001) (unwed father sought relief from registry deadline where he filed one day late); *accord Marco C. v. Sean C.*, 181 P.3d 1137, 1139 (Ariz. Ct. App. 2008). New York clarified its interest in creating "adoption procedures possessed of promptness and finality." *In re Robert O.*, 80 N.Y.2d 254, 264 (N.Y. 1992).

The filing or concluding of paternity actions and executing voluntary acknowledgments of paternity may exempt a father from registry requirements or the *Lehr* standard. See Gilsinger, *Requirements and Effects*, supra at § 6; e.g., *J.S.A. v. M.H.*, 863 N.E.2d 236, 252 (Ill. 2007) (father's filing of a paternity action prior to the filing of an adoption exempted him from the registry deadline); *In re Adoption of A.K.S.*, 713 N.E.2d 896, 898 (Ind. Ct. App. 1999) (father's voluntary acknowledgment of paternity affidavit provided an exception to the registry requirement). However, even where an unwed father has established paternity, California recently elucidated the importance of prenatal abandonment upon a determination of an unwed father's consent rights in an interstate case involving a New York father and a mother who delivered in California. *Adoption of A.S.*,

151 Cal. Rptr. 3d 15 (Ct. App. 2012). The court discussed how both California and New York require an unwed father to assume responsibilities – in this case, prenatal responsibilities – in order to protect consent rights over and above biology and paternity decrees. *Id.* at 31-32.

Fathers may claim impossibility exceptions or exemptions. See *In re Robert O.*, 80 N.Y.2d at 262-63; (father sought registry exemption where he did not know of pregnancy); *Friehe v. Schaad*, 545 N.W.2d 740, 747 (Neb. 1996) (father sought registry exemption where he and mother were still discussing adoption when the filing deadline ran); *In re Adoption of Reeves*, 831 S.W.2d 607, 609-10 (Ark. 1992) (father sought exemption from registry where mother lied in stating father was unknown); *Beltran v. Allan*, 926 P.2d 892, 894-95 (Utah Ct. App. 1996) (father sought impossibility exception to registry requirement where child was conceived in California and adoption was filed in Utah). Interstate cases pose particular problems for the protection of fathers' rights. In addition to state registries, Senator Mary Landrieu has introduced a national putative father registry bill that would connect all state registries to a central database, require notice of a dependency or adoption action to a father timely registered in any state, and urge prenatal abandonment law in all states. See S. 3321, 112th Congress (2012); H.R. 6035, 112th Congress (2012).

Prenatal Abandonment laws clarify consent rights in newborn adoptions and exist in twenty-four states. See Appendix A. As in the instant case, states divest fathers' consent rights upon prenatal abandonment, which is defined either in statute or case law. These laws inform a mother's reproductive autonomy by

determining whether a mother's liberty interest in her child is unfettered. A mother of a nonmarital child has control of placing her child for adoption where the father does not meet the state law requirements for a consent father. A father's prenatal abandonment and/or his rights to influence an adoptive placement necessarily inform mothers facing financial constraints as to the wisdom of continuing a pregnancy and/or planning an adoption.

Where prenatal abandonment law does not exist or where a court trumps it as in the instant case, a father's filing of a paternity action after abandoning his child and the mother during the pregnancy creates significant conflict and defeats a mother's planning. Establishing paternity defensively should not substitute for prenatal support:

> We should not equate the filing of "court papers" and the taking of legal positions with the establishment of human relationships. A child can be abandoned just as surely when papers have been filed with a court as when they have not been. While those papers sit in a folder in a courthouse, children grow. They are read to and tucked in at night. They are nursed to health. They are taught.

Ex parte *J.W.B.*, 933 So.2d 1081, 1092 (Ala. 2005).

V. Evolution of States' Laws and Mothers' Rights

States have developed laws to protect birth mothers' liberty interests in their children as well as their rights to safety from abuse and manipulation. Poverty, domestic violence, and precarious financial situations characterize relinquishing mothers. Evan

P. DONALDSON ADOPTION INST., SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS 26-27 (2007), http://www.adoptioninstitute.org/publications/2006BirthparentStudyrevised07.pdf [hereinafter *Evan P. Donaldson Adoption Inst.*). A birth mother's choice of adoptive parents and ongoing contact/information about her child are key factors in her post relinquishment adjustment. *Id.* at 11. A father who refuses to provide financial support to a woman pregnant with his child manipulates her physical safety and her choices among abortion, adoption, and parenting. In the instant case, Mother's victimization was further complicated by Father's Indian status.

One in every four women will experience domestic violence in her lifetime. PATRICIA TJADEN & NANCY THOENNES, U.S. DEPT. OF J., EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 9 (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf. Domestic violence is characterized by coercive control of a victim through physical, sexual, psychological or financial abuse. See Office on Violence Against Women, U.S. DEPT. OF J., *Domestic Violence*, http://www.ovw.usdoj.gov/domviolence.htm (last visited Feb. 20, 2013). Physical and sexual abuse are recognized forms of domestic violence; psychological and financial manipulation are less recognized but nonetheless constitute abuse. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 889 (1992); *Economic Abuse Fact Sheet*, Nat'l Coal. Against Domestic Violence, http://www.ncadv.org/files/EconomicAbuse.pdf [hereinafter *Economic Abuse Fact Sheet*].

Adoptive Couple typifies the abuse that women face during pregnancy. Father refused Mother's request for financial support by the time of her first prenatal

appointment (in time to abort) unless she married him. Petition for a Writ of Certiorari, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (2012) (No. 12-399), 2012 WL 4502948 at *5. Such exploitation works to force the victim to stay in the relationship, deprive her of necessary monies for herself or her children, rob her of autonomy, and keep her "financially limited if . . . she chooses to leave the relationship." *Economic Abuse Fact Sheet*, supra at 1; accord *Planned Parenthood*, 505 U.S. at 888. Father texted Mother his preference to terminate his parental rights rather than pay support. Petition for a Writ of Certiorari, supra at *5. Mother then voluntarily chose adoption as the best option for her child based upon her circumstances. *Id.* Four months after the birth/placement of the child, Father invoked ICWA because Mother did not keep his baby. *Adoptive Couple*, 731 S.E.2d at 555.

After refusing all responsibility for Mother and Baby Girl during Mother's pregnancy, Father wrested control of Baby Girl from Mother, who had dedicated over nine months of her life subjecting her health and finances to a pregnancy taking responsibility for the very child for whom Father had refused to take any responsibility. Father prevailed in obtaining court ordered transfer of the child to his Indian family. Petition for a Writ of Certiorari, supra at *7. This eviscerated Mother's liberty interest in placing Baby Girl for adoption and diminished Mother's post-relinquishment recovery by voiding her choice of an adoptive family – all theoretically protected by the South Carolina legislature. E.g., *In re N.N.E.*, 752 N.W.2d 1, 9 (Iowa 2008) ("The State has no right to influence [a birth mother's] decision by preventing her from choosing a family she feels is best suited to

raise her child."); *Evan P. Donaldson Adoption Inst.*, supra at 11.

Such manipulations typify domestic abuse. Abusers' use of legal processes – in this case ICWA – to continue to control victims to return to them is often not recognized by judges. Gender Bias in the Courts Taskforce, *Gender Bias in the Courts of the Commonwealth Final Report*, 7 WM. & MARY J. WOMEN & L. 705, 751 (2001). "In fact, many abusers appear to be manipulating the court." *Id.* This is seen in the instant case in that both the majority and the dissent recite disturbing facts but do not put a name to them. *Adoptive Couple*, 731 S.E.2d at 553; *id.* at 661 (Kittredge, J., dissenting). Invisible abuse – putting a gun to a woman's head or withholding finances for rent and food – controls a woman/mother as effectively as bruising blows.

Such judicial oversight exposes pregnant women to domestic abuse and homicide. See *Planned Parenthood*, 505 U.S. at 889 ("The number of battering incidents is high during the pregnancy and often the worst abuse can be associated with pregnancy."); Donna St. George, *CDC Explores Pregnancy-Homicide Link*, WASH. POST, Feb. 23, 2005, at A05. Between 3.9% and 20% of pregnant women are abused. Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 670-71 (2006). The first or second leading cause of death for pregnant women is domestic homicide. *Id.* at 671-72; Rebekah Kratochvil, *Intimate Partner Violence During Pregnancy: Exploring the Efficacy of a Mandatory Reporting Statute*, 10 HOUS. J. HEALTH L. & POL'Y 63, 69 (2009). Abuse and homicide are inescapable terrors for pregnant women who render themselves uniquely vulnerable by the obligations

they assume in continuing pregnancies and protecting newborns. Half of American pregnancies are unintended and half of those result in abortion. Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 CONTRACEPTION 478 (2011), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3338192/ (cited by CDC, *Unintended Pregnancy Prevention*, http://www.cdc.gov/reproductivehealth/unintendedpregnancy/). When women choose to continue unintended pregnancies where unwed fathers are refusing support, they rely upon prenatal abandonment laws to escape physical and economic abuse and to provide them with an unfettered liberty interests in placing children for adoption. Withholding the protection of state prenatal abandonment laws in the name of ICWA eviscerates women's constitutional interests in parenting decisions and their unquestionable right to life.

States, each with their own domestic abuse, dependency, paternity, and dissolution laws, have highly developed adoption laws protecting mothers' constitutional rights in parenting and safety. Here, state legislatures act not as mere "junior-varsity" but as sovereign participants in cooperative federalism to protect the rights of unwed fathers, their children, and their mothers in adoption. See generally *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). This Court previously described this cooperative federalism as promoting state "innovation and responsiveness." *Gregory v. Ashcroft*, 501 U.S. 452, 457-58 (1991). The instant Father gave Mother a "no support or marriage" ultimatum, had his friends stalk her only to learn she was working fourteen hour days, texted her his choice to relinquish parental rights rather than

support her, declined to visit her or the child in the hospital, and used court processes to eviscerate her liberty interest in adoptive placement of her child. Transcript of Record at 482-83, *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (2012) (No. 2009-DR-10-3803). South Carolina law should have protected Mother from all of this, but its courts allowed Father to use ICWA to complete his victimization of Mother.

The Academy urges the Court to apply the South Carolina definition of parent to Father and find that he is not a parent under ICWA. To uphold the South Carolina Supreme Court's decision will decimate decades of state and federal jurisprudence, will throw into disarray the validity of state laws across the nation, and will trample the rights of single mothers.

VI. EXISTING INDIAN FAMILY DOCTRINE

In addressing the issue of the Existing Indian Family Doctrine (EIFD), the Court must determine:

1. Does the Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield* mandate the rejection of the EIFD?
2. Is the EIFD legally permissible to prevent the unwarranted expansion of ICWA in violation of the constitutional principles underlying ICWA's enactment?

A. The *Holyfield* Decision Does Not Address the EIFD and Does Not Require the Rejection of the EIFD

In its enactment of ICWA, Congress set forth a Congressional Declaration of Policy, which states:

> [I]t is the policy of this Nation to protect the best interests of Indian children and to promote

> the stability and security of Indian tribes and families *by the establishment of minimum Federal standards for the removal of Indian children from their families* and the placement of such children in foster or adoptive homes . . . .

25 U.S.C. § 1902 (2006) (emphasis added). ICWA also states that in a termination of parental rights proceeding, the following requirement must be met:

> No termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, . . . *that the continued custody of the child by the parent or Indian custodian* is likely to result in serious emotional or physical damage to the child.

25 U.S.C. §1912(f) (2006) (emphasis added).

The above-cited sections of ICWA have led many state courts to adopt the EIFD. Although the Kansas Supreme Court, in *In re Adoption of Baby Boy L.*, was the first court to recognize the EIFD, it rejected the doctrine after misreading *Holyfield*. See 643 P.2d 168 (Kan. 1982); *In re A.J.S.*, 204 P3d 543 (Kan. 2009). In adopting the EIFD, the court found that where an infant is born out-of-wedlock to a non-Indian mother and where the child had spent his entire life in the care of non-Indians and had not been removed from an Indian family, application of ICWA would violate the intent of Congress rather than uphold the law's intended purpose. *In re Adoption of Baby Boy L.*, 643 P.2d. at 175.

The Court's only previous decision regarding ICWA is *Mississippi Band of Choctaw Indians v. Holyfield*. 490 U.S. 30 (1989). *Holyfield* does *not* address the validity of the EIFD. In *Holyfield*, twins were born out-of-wedlock to an Indian mother, who resided on

the Choctaw reservation. *Id.* at 37. The children were born off the reservation where their mother immediately placed them from the hospital into an adoptive placement. *Id.* at 46. This Court held, pursuant to section 1911(a) of ICWA, that the tribal court had exclusive jurisdiction. *Id.* at 53 (citation omitted).

Since the 1989 *Holyfield* decision, numerous states have rejected the EIFD, finding that *Holyfield* mandates the rejection of the EIFD. As one of those states, the Kansas Supreme Court overturned its earlier holding in *Baby Boy L.* and has now rejected the EIFD. *In re A.J.S.*, 204 P.3d at 551. In rejecting its earlier recognition of the EIFD, the Kansas Supreme Court stated that the continued acceptance of the EIFD "'would undermine the significant tribal interests recognized by the Supreme Court in *Holyfield*.'" *Id.* at 550 (quoting *In re Baby Boy C.*, 27 A.D.3d 34, 48 (N.Y. App. Div. 2005)).

After *Holyfield*, states rejecting the EIFD have stated that implementation of the EIFD would undermine the significant tribal interests recognized by the Supreme Court in *Holyfield*. E.g., *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *In re Adoption of Baade*, 462 N.W.2d 485, 489-90 (S.D. 1990); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Elliott*, 554 N.W.2d 32, 35-36 (Mich. Ct. App. 1996); *In re Baby Boy C.*, 27 A.D.3d at 48.

Holyfield, in addressing exclusive tribal court jurisdiction involving Indian children that reside or are domiciled on a tribal reservation, cited the Utah Supreme Court decision *In re Adoption of Halloway*, which addressed jurisdiction involving an Indian

child domiciled on an Indian reservation. See 732 P.2d 962, 969-70 (Utah 1986).

Holyfield cites *Halloway*'s emphasis on tribal relationships with children who are domiciled on their reservations and in these situations, "the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989) (quoting *Halloway*, 732 P.2d at 969). This statement is often taken out of context as grounds for rejecting the EIFD. The Court's cite to *Halloway* was addressing situations involving Indian children *who are domiciled on a reservation* and subject to exclusive tribal court jurisdiction. *Holyfield*'s reference to *Halloway* states:

> To the extent that [state] abandonment law operates to permit [the child's] mother to change [the child's] domicile as part of a scheme to facilitate his adoption by non-Indians *while she remains a domiciliary of the reservation*, it conflicts with and undermines the operative scheme established by subsections [1911(a)] and [1913(a)] *to deal with children of domiciliaries of the reservation* and weakens considerably the tribe's ability to assert its interest in its children. *The protection of this tribal interest* is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents. *This relationship between Indian tribes and Indian children domiciled on the reservation* finds no parallel in other ethnic cultures found in the United States.

Id. at 52-53 (quoting *Halloway*, 732 P.2d at 969-70) (emphasis added).

The *Holyfield* decision does **not** address the validity of the EIFD. See *Rye v. Weasel,* 934 S.W.2d 257, 262 (Ky. 1996) (citation omitted); *In re Adoption of Crews*, 825 P.2d 305, 310 (Wash. 1992).

The misinterpretation *Holyfield* has led to the rejection by numerous state courts of the EIFD, when in reality the EIFD is legally appropriate to prevent an unwarranted expansion of the ICWA that is not constitutionally permissible.

B. The EIFD is an Appropriate Safeguard Against the Expansion of ICWA Beyond What is Constitutionally Permissible

As part of ICWA, Congress set forth the following Congressional findings:

> *Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people*, the Congress finds—
>
> (1) that clause 3, section 8, article I of the United States Constitution provides that *"The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes"* and, through this and other constitutional authority, *Congress has plenary power over Indian affairs;*
>
> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that *the United States has a direct interest, as trustee,*

> in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

25 U.S.C. § 1901 (2006) (emphasis added).

The ICWA was enacted pursuant to Congress's power to regulate commerce and based upon its trustee relationship with Indian tribes. See *Bd. of Cnty. Comm'rs v. Seber*, 318 U.S. 705, 715 (1943). The constitutionality of ICWA has been upheld by lower courts citing *Morton v. Mancari*, a 1974 United States Supreme Court decision which upheld a law granting a hiring preference for Native Americans by the Bureau of Indian Affairs. See 417 U.S. 535 (1974). In that decision, the Court stated that "the preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . ." *Id.* at 554.

The *Morton* test was also at the heart of this Court's 2000 decision invalidating a Hawaiian state constitutional provision that required trustees of the Office of Hawaiian Affairs, who administered income from land held by the state, to be "Hawaiian" and be elected only by "Hawaiians." See *Rice v. Cayetano*, 528 U.S. 495 (2000). In striking down this Hawaiian state constitutional provision, this Court emphasized that the case differed from cases, like *Morton*, involving Indian tribes. *Id.* at 518-20. This Court stated that to avoid being an unlawful racial classification the preference could not be directed to a racial group but rather members of federally recognized tribes. *Id.* at 519-20.

Since being adopted by the Kansas Supreme Court in 1982, the EIFD has been recognized by a significant number of state courts. See *In re S.A.M.*,

703 S.W.2d 603, 608-09 (Mo. Ct. App. 1986); *Claymore v. Serr*, 405 N.W.2d 650, 653-54 (S.D. 1987); *In re Adoption of T.R.M.*, 525 N.E.2d at 303; *In re Adoption of Crews*, 825 P.2d at 305; *In re S.C.*, 833 P.2d 1249 (Okla. 1992) (overruled by *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995); *Rye v. Weasel*, 934 S.W.2d at 261-64; *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Ct. App. 2001) (describing the California appellate court split); *In re Morgan*, 1997 Tenn. App. LEXIS 818, *43-44 (Ct. App. 1997); *Ex parte C.L.J.*, 946 So. 2d 880, 889 (Ala. Civ. App. 2006); *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990); *In re N.J.*, 221 P.3d 1255, 1264-65 (Nev. 2009).

The South Carolina Supreme Court's decision in *Adoptive Couple v. Baby Girl* places South Carolina in the company of state courts who have rejected the EIFD. See *Adoptive Couple*, 731 S.E.2d at 558 n.17; *In re Adoption of Child of Indian Heritage*, 543 A.2d 925, 932 (N.J. 1988); *In re Adoption of T.N.F.*, 781 P.2d at 976-77; *In re Adoption of Baade*, 462 N.W.2d at 489-90; compare *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (describing the California appellate court split) with *In re Crystal K.*, 276 Cal. Rptr. 619, 624-25 (Ct. App. 1990) (adopting the existing family doctrine); *In re Baby Boy Doe*, 849 P.2d at 931-32; *In re Adoption of S.S.*, 622 N.E.2d 832, 838-39 (Ill. App. Ct. 1993) (reversed by *In re Adoption of S.S.*, 657 N.E.2d 935 (Ill. 1995)); *In re D.A.C.*, 933 P.2d 993, 997-1000 (Utah Ct. App. 1997); *Michael J. Jr. v. Michael J. Sr.*, 7 P.3d 960, 963-64 (Ariz. Ct. App. 2000); *In re Baby Boy L.*, 103 P.3d at 1105; *In re Baby Boy C.*, 27 A.D.3d at 36; *In re Petition of N.B.*, 199 P.3d 16, 20-22 (Colo. App. 2007); *In re A.J.S.*, 204 P.3d at 551.

The above summary of cases includes California, Kansas, Oklahoma, and South Dakota decisions, which originally adopted the EIFD, as well as these states' appellate courts' subsequent post-*Holyfield* decisions rejecting the EIFD. While numerous states (California, Iowa, Oklahoma, Washington, and Wisconsin) have rejected the EIFD by passage of state statutes (see e.g., CAL. FAM. CODE § 175 (West 2012); CAL. WELF. & INST. CODE § 224 (West 2012); IOWA CODE § 232B.5(2) (West 2012); OKLA. STAT. ANN. tit. 10, §§ 40.1, 40.3 (West 2012); WASH. REV. CODE ANN. §§ 13.34.040(3), 26.33.040(1)(a) (West 2012); WIS. STAT. ANN. § 48.028(3) (West 2012)), it is highly unlikely these statutes can lawfully restrict state courts from interpreting ICWA regarding its application. In California, where the EIFD has been banned pursuant to legislation, (CAL. FAM. CODE § 175, CAL. WELFARE & INST. CODE § 224), such legislation cannot be legally controlling given the EIFD was adopted in California based upon constitutional considerations. See *In re Santos Y.*, 112 Cal. Rptr. 2d at 726-27; *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 520-21 (Ct. App. 1996).

Congress's overriding concern in its enactment of ICWA was to strengthen relationships between existing Indian families and to ensure Indian children are exposed to their Native American heritage. In its passage of ICWA, Congress specifically stated that the Act and in particular 25 U.S.C. 1915(a) and (b), regarding placement preferences, "is *not* to be read as precluding placement of the Indian child with a non-Indian family." H.R. REP. NO. 95-1386 (1978); 1978 WL 8515, at *23 (1978) (emphasis added).

In decisions adopting the EIFD, state appellate courts have stated that ICWA should not be applied to cases where the child is not part of an intact Indian family and is not residing on an Indian reservation. Many of these decisions also involved voluntary adoption proceedings where the child was *not* involuntarily removed from the child's family. For example, in upholding the EIFD, California appellate courts have stated:

> Any application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly upon race and is subject to strict security under the equal protection clause . . . . The facts upon which we relied in concluding that application of the ICWA to this Minor constituted a violation of substantive due process lead to the conclusion that application of the ICWA to the Minor constitutes a violation of equal protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution.

In re Santos Y., 112 Cal. Rptr. 2d at 719, 730 (quoting in part *In re Bridget R.*, 49 Cal. Rptr. 2d at 528).

Likewise, the Kentucky Supreme Court, addressing the validity of the EIFD, stated:

> [T]he Existing Indian Family Doctrine is not really a judicially created exception, but rather that the ICWA was never meant to apply in those cases . . . where the Indian children had

> lived with their non-Indian mothers for seven and six years respectively.

Rye v. Weasel, 934 S.W.2d at 263.

Since 1978 and the enactment of ICWA, the legal landscape regarding the protection of children is radically different. Our nation has enacted numerous laws to further protect children, their familial relationships and parental rights. Over thirty-two states now have laws that legally recognize the benefits of open adoptions. See CHILD WELFARE INFO. GATEWAY, U.S. DEPT. OF HEALTH AND HUMAN SERV., POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES 2 (2011), https://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.pdf. Open adoptions promote appropriate post-adoption contact and the sharing of information between adoptive families, the child and the child's birth parent(s). Such laws involving Native American children, as well as other children, allow the child to learn of their ancestral heritage and, in many situations, participate in cultural events.

In 1997 Congress enacted the Adoptions and Safe Families Act (ASFA), 42 U.S.C. §§ 670-79 (2006). ASFA mandates that in all cases where county or state social service agencies involuntarily remove a child from her home, the court must find that it is contrary to the child's welfare to remain in the home of her parents or custodian. See 42 U.S.C. § 671(a)(15)(A) (2006). See 42 U.S.C. § 671(a)(15)(B)(i) (2006). ASFA also mandates that social service

agencies develop a case plan that involves the child's parents with a goal of reunification of the child with their parents. *Id.* at §§ 671(a)(16), 675(1). AFSA mandates a periodic review by the court, at least every six months, of each case to determine

> the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care and, to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship.

Id. at § 675(5)(B). AFSA also requires in all cases, including those involving an Indian child, a preference for the child's placement with a relative. *Id.* at § 675(a)(19).

Since the enactment of ICWA, the Uniform Child Custody Jurisdiction and Enforcement Act has been enacted in all fifty states. This Act is important, especially in termination of parental rights proceedings for determining which state has jurisdiction.

As more fully discussed *supra*, numerous states have enacted laws establishing putative father registries. See Beck, *A Nat'l Putative Father Registry*, supra, app. at 339.

In 1980, Congress passed the Parental Kidnapping Prevention Act (PKPA). This federal law in part, requires states to enforce their sister states' custody orders and refrain from modifying orders already issued by another state or an Indian tribe. See 28 U.S.C. § 1738(A)(n) (2006); *In re Larch*, 872 F.2d 66 (4th Cir. 1989).

Finally, in 1994 Congress enacted the Multiethnic Placement Act (MEPA). MEPA prohibits a person or government entity involved in adoption or foster care placements from denying any individual the opportunity to be an adoptive or foster parent on the basis of the race, color, or national origin of the individual or the child involved. 42 U.S.C. § 1996b(1)(a) (2006).

Given the scope of constitutional authority for the enactment of ICWA, the post 1978 legislation affording greater protections for all children and families, and the constitutional rights of children and parents impacted in these cases, the EIFD is an appropriate check on the unwarranted expansion of ICWA.

CONCLUSION

The decision of the South Carolina courts should be reversed and the case remanded with instructions for the adoption to proceed pursuant to the Court's ruling herein.

Respectfully submitted,

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APPENDIX

APPENDIX

Prenatal Abandonment Statutes and Case Law by State

STATE	STATUTE/CASE LAW
Alabama	ALA. CODE § 26-10A-9 (2012)

Wording of Statute

(a) A Consent or relinquishment required by Section 26-10A-7 may be implied by any of the following acts of a parent: (1) Abandonment of the adoptee. Abandonment includes, but is not limited to, the failure of the father, with reasonable knowledge of the pregnancy, to offer financial and/or emotional support for a period of six months prior to birth.

California	*Adoption of Kelsey S.*, 49 P.2d 1216, 1236-37 (Cal. 1992)

"If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother. A court should consider all factors relevant to that determination. The father's conduct both before and after the child's birth must be considered. Once he knows or reasonably should know of the pregnancy, he must promptly attempt to

assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate "a willingness himself to assume full custody of the child—not merely to block adoption by others." (Raquel Marie, *supra*, 76 N.Y.2d at p. 408, 559 N.E.2d at p. 428, 559 N.Y.S.2d at p. 865.) A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child"

Colorado — COLO. REV. STAT. § 19-5-105(3.1)(c)(III) (2012)

Wording of Statute

(c) That the parent has not promptly taken substantial parental responsibility for the child. In making this determination the court shall consider, but shall not be limited to, the following: (III) Whether the birth father has failed to substantially assist the mother in the payment of the medical, hospital, and nursing expenses, according to that parent's means, incurred in connection with the pregnancy and birth of the child.

Florida — FLA. STAT. § 63.089(3-4) (2012)

Wording of Statute

(3) Grounds for terminating parental rights pending adoption. The court may enter a judgment terminating parental rights pending adoption if the court determines by clear and convincing evidence, supported by written findings of fact, that each person whose consent to adoption is required under s. 63.062:

(d) Has been properly served notice of the proceeding in accordance with the requirements of this chapter and has failed to file a written answer or personally appear at the evidentiary hearing resulting in the judgment terminating parental rights pending adoption;

(4) Finding of abandonment. A finding of abandonment resulting in a termination of parental rights must be based upon clear and convincing evidence that a parent or person having legal custody has abandoned the child in accordance with the definition contained in § 63.032. A finding of abandonment may also be based upon emotional abuse or a refusal to provide reasonable financial support, when able, to a birth mother during her pregnancy or on whether the person alleged to have abandoned the child, while being able, failed to establish contact with the child or accept responsibility for the child's welfare.

(a) In making a determination of abandonment at a hearing for termination of parental rights under this chapter, the court shall consider, among other relevant factors not inconsistent with this section:

1. Whether the actions alleged to constitute abandonment demonstrate a willful disregard for the safety or welfare of the child or the unborn child;

2. Whether the person alleged to have abandoned the child, while being able, failed to provide financial support;

3. Whether the person alleged to have abandoned the child, while being able, failed to pay for medical treatment; and

4. Whether the amount of support provided or medical expenses paid was appropriate, taking into consideration the needs of the child and relative means and resources available to the person alleged to have abandoned the child.

Idaho — IDAHO CODE ANN. § 16-1504(2)(b)(iii) (West 2012)

Wording of Statute

(2) In accordance with subsection (1) of this section, the consent of an unmarried biological father is necessary only if the father has strictly complied with the requirements of this section. (b) With regard to a child who is under six (6) months of age at the time he is placed with adoptive parents, an unmarried biological father shall have manifested a full commitment to his parental responsibilities by performing all of the acts described in this subsection prior to the placement for adoption of the child in the home of prospective parents or prior to the date of commencement of any proceeding to terminate the parental rights of the birth mother, whichever event occurs first. The father shall: (iii) If he had actual knowledge of the pregnancy, pay a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his means, and when not prevented from doing so by the person or authorized agency having lawful custody of the child.

Iowa — IOWA CODE § 600A.8(3)(a)(2)(d) (2012)

Wording of Statute

3. The parent has abandoned the child. For the purposes of this subsection, a parent is deemed to

have abandoned a child as follows: (a)(2) In determining whether the requirements of this paragraph are met, the court may consider all of the following: (d) With regard to a putative father, whether the putative father paid a fair and reasonable sum, in accordance with the putative father's means, for medical, hospital, and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child, or whether the putative father demonstrated emotional support as evidenced by the putative father's conduct toward the mother.

Kansas — KAN. STAT. ANN. § 59-2136(h)(1)(D) (West 2012)

Wording of Statute

(h)(1) When a father or alleged father appears and asserts parental rights, the court shall determine parentage, if necessary pursuant to the Kansas parentage act, K.S.A. 23-2201 *et seq.*, and amendments thereto. If a father desires but is financially unable to employ an attorney, the court shall appoint an attorney for the father. Thereafter, the court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following: (D) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth.

Michigan — MICH. COMP. LAWS § 710.39(2) (2012)

Wording of Statute

(2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance

with the putative father's ability to provide such support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA.

Mississippi — *John Doe v. Attorney W.*, 410 So.2d 1312, 1317 (Miss. 1982)

"Doe allowed the natural mother to bear all the physical, mental and financial burdens of pregnancy and childbirth without at any time assisting her financially. At this time, according to the record, he has not offered her any aid for the child. Upon such a record, we cannot hold that the lower court erred in finding that Doe's parental rights to the child were terminated in part on the ground of abandonment of the child."

Montana — *In the Matter of the Adoption of D.J.V.*, 796 P.2d 1076, 1079 (Mont. 1990)

"By Kent's own admission, he has not paid any expenses of Carolyn's pregnancy or hospitalization, or any child support since the birth of D.J.V. This is not a case where the father is suffering financial hardship. Thus, there is ample 'clear and convincing evidence' to support the District Court's termination of Kent's parental rights."

New Jersey — N.J. Stat. Ann. § 9:3-46(a) (West 2012)

Wording of Statute

In determining whether a parent has affirmatively assumed the duties of a parent, the court shall consider, but is not limited to consideration of, the fulfillment of financial obligations for the birth and care of the child, demonstration of continued interest in the child, demonstration of a genuine effort to maintain communication with the child, and demonstration of the establishment and maintenance of a place of importance in the child's life.

New Mexico — N.M. STAT. ANN. § 32A-5-3(F)(4)(a) (West 2012)

Wording of Statute

(4) has openly held out the adoptee as his own child by establishing a custodial, personal or financial relationship with the adoptee as follows: (a) for an adoptee under six months old at the time of placement: 1) has initiated an action to establish paternity; 2) is living with the adoptee at the time the adoption petition is filed; 3) has lived with the mother a minimum of ninety days during the two-hundred-eighty-day period prior to the birth or placement of the adoptee; 4) has lived with the adoptee within the ninety days immediately preceding the adoptive placement; 5) has provided reasonable and fair financial support to the mother during the pregnancy and in connection with the adoptee's birth in accordance with his means and when not prevented from doing so by the person or authorized agency having lawful custody of the adoptee or the adoptee's mother; 6) has continuously paid child support to the mother since the adoptee's birth in an amount at

least equal to the amount provided in Section 40-4-11.1 NMSA 1978, or has brought current any delinquent child support payments; or 7) any other factor the court deems necessary to establish a custodial, personal or financial relationship with the adoptee;

New York — N.Y. DOM. REL. LAW § 111(1)(e)(iii) (McKinney 2008)

Wording of Statute

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows: (e) Of the father, whether adult or infant, of a child born out-of-wedlock who is under the age of six months at the time he is placed for adoption, but only if: (i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.

North Dakota — *In the Interest of F.H.*, 283 N.W.2d 202, 214 (N.D. 1979)

"We conclude the record, by clear and convincing evidence, supports a finding that William abandoned his child. His failure to discharge the obligations of a parent, both before and after the birth of the child, demand that his parental rights over the child be terminated. We cannot allow the welfare and happiness of the child in this case to be destroyed in

the name of protecting rights which have never been exercised and of which corresponding obligations have never been fulfilled."

Ohio	OHIO REV. CODE ANN. § 3107.07(B)(2)(c) (West 2012)

Wording of Statute

(B) The putative father of a minor if either of the following applies: (2)(c) The putative father has willfully abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or the minor's placement in the home of the petitioner, whichever occurs first.

Oklahoma	OKLA. STAT. tit. 10 § 7505-4.2(C)(1) (2012)

Wording of Statute

C. Consent to adoption is not required from a father or putative father of a minor born out of wedlock if: 1. The minor is placed for adoption within ninety (90) days of birth, and the father or putative father fails to show he has exercised parental rights or duties towards the minor, including, but not limited to, failure to contribute to the support of the mother of the child to the extent of his financial ability during her term of pregnancy; or

South Carolina	S.C. CODE ANN. § 63-9-310(A)(5)(b) (West 2012)

Wording of Statute

(A) Consent or relinquishment for the purpose of adoption is required of the following persons: (5) the father of a child born when the father was not married to the child's mother, if the child was placed

with the prospective adoptive parents six months or less after the child's birth, but only if: (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

Tennessee — Tenn. Code Ann. § 36-1-102(1)(A)(iii) (West 2012)

Wording of Statute

A biological or legal father has either willfully failed to visit or willfully failed to make reasonable payments toward the support of the child's mother during the four (4) months immediately preceding the birth of the child; provided, that in no instance shall a final order terminating the parental rights of a parent as determined pursuant to this subdivision (1)(A)(iii) be entered until at least thirty (30) days have elapsed since the date of the child's birth;

Texas — TEX. FAM. CODE § 161.001.1(H) (2012)

Wording of Statute

The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence: (1) that the parent has: (H) voluntarily, and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of

the child, and remained apart from the child or failed to support the child since the birth.

Utah — UTAH CODE ANN. § 78B-6-121(3) (West 2012)

Wording of Statute

(3) Except as provided in Subsections (6) and 78B-6-122(1), and subject to Subsection (5), with regard to a child who is six months of age or less at the time the child is placed with prospective adoptive parents, consent of an unmarried biological father is not required unless, prior to the time the mother executes her consent for adoption or relinquishes the child for adoption, the unmarried biological father: (d) offered to pay and paid, during the pregnancy and after the child's birth, a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his financial ability, unless: (i) he did not have actual knowledge of the pregnancy; (ii) he was prevented from paying the expenses by the person or authorized agency having lawful custody of the child; or (iii) the mother refuses to accept the unmarried biological father's offer to pay the expenses described in this Subsection (3)(d).

Vermont — VT. STAT. ANN. tit. 15A § 3-504(a)(1)(A) (West 2012)

Wording of Statute

(1) In the case of a minor under the age of six months at the time the petition is filed, the respondent did not exercise parental responsibility once he or she knew or should have known of the minor's birth or expected birth. In making a

determination under this subdivision, the court shall consider all relevant factors, which may include the respondent's failure to: (A) pay reasonable prenatal, natal, and postnatal expenses in accordance with his or her financial means;

Washington	*In re Infant Child Skinner*, 982 P.2d 670, 678 (Wash. Ct. App. 1999)

"There is no evidence that Williams provided emotional or financial support for Skinner during her pregnancy or attempted to take responsibility for the support of the child. Indeed, Skinner testified that she contacted New Hope because she did not believe she had adequate support to raise the child . . . As discussed above, the record supports the court's findings that Williams did not take responsibility for the child and did not have any concrete plans for his future employment or the child's support. Moreover, Williams himself testified that he had stopped attending classes at the Clallam Bay facility and was fired from his job. He also testified that he was willing to take parenting classes at the Clallam Bay facility, but he did not indicate that he had taken such classes already. We conclude that Williams's challenges to the court's findings and conclusions are without merit, and we affirm the order terminating his parental rights."

West Virginia	W.VA. CODE § 48-22-306(b)(2) (2012)

Wording of Statute

Abandonment of a child less than 6 months shall be presumed when the birth father: (2) fails to contribute within his means toward the expense of

prenatal and postnatal care of the mother and postnatal care of the child.

Wisconsin	WIS. STAT. § 48.415(6)(b) (2011)

Wording of Statute

(b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

AMICUS CURIAE BRIEF

No. 12-399

Supreme Court, U.S.
MAR 2 8 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

—v.—

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

ON WRIT OF CERTIORARI
TO THE SOUTH CAROLINA SUPREME COURT

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SOUTH CAROLINA, IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of South Carolina is a state affiliate of the national ACLU. In furtherance of its mission, the ACLU has supported federal laws designed to preserve Indian families and respect the cultural heritage of Indian tribes. The ACLU has also advocated in favor of children's rights and a child's interest in family integrity. The proper resolution of this case is, therefore, a matter of significant importance to the ACLU and its members.

SUMMARY OF ARGUMENT

This case presents a clash between a federal law of singular importance—the Indian Child Welfare Act of 1978 (ICWA)—and conflicting state law that threatens to eviscerate the federal statutory scheme and undermine federal policy. In enacting ICWA, Congress was responding to the widespread removal of Indian children from their families and tribes by state authorities. 25 U.S.C. § 1901 (Congressional findings); *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 32 (1989). The Act establishes "minimum Federal standards"

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[1] The parties to this case have filed blanket letters of consent with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than *amici*, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

for the foster and adoptive placements of Indian children in order to protect the children's bonds with their families and tribes and to promote the stability and security of tribes. 25 U.S.C. § 1902. The Act applies only to children who are members of a federally-recognized tribe or eligible for membership and the biological child of a tribal member. 25 U.S.C. § 1903(4). Because the key statutory trigger is tribal membership and not racial or ethnic heritage, the Act falls squarely within the plenary power of Congress over Indian affairs. U.S. Const. art. 1, § 8, cl. 3; 25 U.S.C. § 1901(1); *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

In the decision below, the South Carolina Supreme Court followed the letter and spirit of ICWA in holding that the adoptive placement of Baby Girl violated the express mandates of federal law. The court's decision to affirm the order transferring custody of Baby Girl to the Father was based on the language of the Act and a careful consideration of Baby Girl's best interests. Father asserted his parental rights under ICWA immediately upon learning that Baby Girl had been placed for adoption. From that point on, beginning when Baby Girl was just four months old, Father was steadfast in his efforts to exercise his parental responsibility and assume custody of his daughter. The South Carolina Supreme Court affirmed the Family Court's assessment of Baby Girl's interests, including Father's prompt objection to the adoption, his parenting abilities, and the benefit to Baby Girl of being raised by her birth parent and extended family within the Cherokee culture. The courts below appropriately found that the bonding between Baby Girl and Petitioners that occurred during this

litigation, by itself, did not justify severance of Father's parental rights under ICWA when weighed against other considerations.

Despite the provisions of the Act and its avowed purpose, Petitioners argue that South Carolina law limiting the rights of an unwed father to object to his child's adoption should be applied to bar Father from asserting his standing as a parent under ICWA. Pet. Br. 19-29. In enacting ICWA, Congress desired to strengthen the rights of parents of Indian children and to supplant state law limitations on those rights. Father both acknowledged and established his paternity by filing appropriate documents in South Carolina Family Court and by undergoing DNA testing. These actions qualified him as a "parent" under ICWA. *See* 25 U.S.C. § 1903(9). Applying South Carolina's paternity limitations and abandonment law to exclude Father as a parent would prevent him from asserting his federal rights under ICWA and would result in uncertainty and unpredictability in the implementation of the Act. In enacting ICWA, Congress made the preemptive effect of the Act quite clear: state courts may turn to state law when it provides a higher measure of protection to a parent of an Indian child, but not when state law falls below the federal standards. *See* 25 U.S.C. § 1921.

Since Father was a "parent" within the meaning of ICWA, the adoption of Baby Girl could not go forward unless and until either a voluntary consent to the adoption was obtained in accordance with the standards of ICWA or Father's parental rights were terminated under ICWA's heightened evidentiary criteria. Congress imposed strict consent

provisions for voluntary removals to ensure that parents of Indian children would not relinquish their parental rights without full understanding of the consequences of their actions. 25 U.S.C. § 1913. As to involuntary terminations, Congress spelled out the required findings and imposed the highest burden of proof available in our legal system because of the record of unwarranted separations of Indian children from their families. 25 U.S.C. § 1912. Father did not consent to the adoption of his child as required by ICWA. Likewise, the courts below carefully considered Father's and Baby Girl's circumstances in concluding that no basis consistent with federal law existed for terminating his parental rights.

Notwithstanding the plain language and underlying purpose of ICWA, Petitioners argue that the Act's protections for Indian children, parents, and tribes do not apply because Baby Girl had never lived with an Indian family prior to her joining Father and her extended family. Pet. Br. at 29-42. The "existing Indian family doctrine" upon which Petitioners rely is a judge-made exception to ICWA that has no grounding in the statutory scheme and conflicts with the core federal policy of tribal self-determination. It has been squarely rejected by the majority of courts to consider it and repudiated by the court that created it.

ARGUMENT

I. THE INDIAN CHILD WELFARE ACT IS A CONSTITUTIONALLY VALID EXERCISE OF CONGRESSIONAL POWER THAT ESTABLISHES ESSENTIAL SAFEGUARDS FOR INDIAN CHILDREN, PARENTS, AND TRIBES.

Beyond doubt, the Indian Child Welfare Act is one of the most significant legislative reforms enacted by Congress to implement the federal policy of promoting tribal sovereignty and self-determination. Exercising federal preemptive power, Congress established minimum standards for the foster and adoptive placements of Indian children in order to protect the children's bonds with their families and tribes and to promote the stability and security of tribes. *See* 25 U.S.C. § 1902 (Congressional declaration of policy). The Act applies only to children who are members of a federally-recognized tribe or eligible for membership and the biological child of a tribal member. 25 U.S.C. § 1903(4). Because the key statutory trigger is tribal membership and not racial or ethnic heritage, the Act falls squarely within the plenary power of Congress over Indian affairs. U.S. Const. art. 1, § 8, cl. 3; 25 U.S.C. § 1901(1); *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (noting that if Congress could not make classifications regarding Indians, "an entire Title of the United States Code (25 U.S.C.) would be effectively erased."); *United States v. Antelope*, 430 U.S. 641, 646 (1977) (upholding a classification based on tribal membership in a criminal statute, and noting that such legislation "is not to be viewed as [race] legislation.")

The Act was designed to address the history of abuses by state authorities that resulted in the widespread foster and adoptive placements of Indian children in non-Indian homes and institutions. Exercising its plenary power to legislate for the benefit of American Indian tribes and tribal members, Congress enacted ICWA after extensive hearings in the 1970's that documented numerous destructive state practices. *See* 25 USC § 1901 (Congressional findings). These practices included efforts by state adoption workers to procure the "voluntary" relinquishment of Indian children without observing basic tenets of due process. *See* H.R. Rep. No. 1386, 95th Cong., 2d Sess., at 11-12 (1978) (hereinafter H.R. Rep. No. 95-1386). Well-intentioned but misguided programs by child welfare groups promoted the widespread adoption of Indian children by non-Indian families, often based on the supposed superiority of Anglo-American culture. *Id.* at 10-11; Arnold L. Lyslo, *Background Information on the Indian Adoption Project: 1958-1967*, in David Fanshel, Far From the Reservation 36 (1972). As this Court has recognized, "Congress was concerned not solely about the interests of Indian children and families but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians." *Holyfield*, 490 U.S. at 49.

Congress reported that poverty, poor health, substandard housing, inadequate schools, and other socio-economic problems that plagued Indian communities contributed to a sense of "cultural disorientation" and "powerlessness" among tribal members. H.R. Rep. No. 95-1386, *supra*, at 12. That sense of alienation disrupted basic parent-child relations and, in turn, tribal affiliations. In addition,

as this Court noted in *Holyfield*, Congress wanted to protect Indian children from the harm they suffer when they lose all connection to their cultural heritage.

> [I]t is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture. Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to the adoption, because of concerns going beyond the wishes of individual parents.

490 U.S. at 49-50.

The complementary goals underlying the Act are "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. To implement these aims, Congress crafted jurisdictional, procedural, and substantive provisions to prevent states from improperly removing Indian children from their parents, extended families, and tribes. *See* 25 U.S.C. §§ 1911-23.

In light of the range of practices by state child welfare authorities and state courts that had been documented during the congressional hearings, Congress gave parental rights a central role in the ICWA structure. Of core relevance here, ICWA does not permit a state to terminate the rights of a parent of an Indian child unless the rigorous criteria of the

Act are met. 25 U.S.C. §§ 1912, 1913. The application of ICWA in the instant case furthers congressional goals by protecting the interests of Baby Girl, a Cherokee child, in being raised by her fit biological father within her extended family and the community of the Cherokee Nation.

A. The South Carolina Family Court Followed The Mandates Of ICWA In Considering Baby Girl's Immediate And Long-Term Welfare And Concluding That Her Best Interests Would Be Served By A Transfer Of Custody To Her Cherokee Father.

A child's best interests are an essential consideration in any ICWA proceeding that intrudes on parental rights or determines a child's out-of-home placement. At a general level, the Act furthers the best interests of Indian children by protecting their familial relations and tribal affiliations against unwarranted state interference. As this Court recognized in *Holyfield*, ICWA is "based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *Holyfield*, 490 U.S. at 50 n.24. That assumption, however, is subject to rebuttal within the structure of the Act based on the child's individual circumstances.

The child's interests are always a central concern under ICWA but with varying emphases according to context. The Act directs state courts to consider the child's welfare at specific junctures. Before ordering a foster care placement or termination of parental rights, for example, courts must consider the likelihood of harm to the Indian

child in continued custody by the parent. *See* 25 U.S.C. 1912(e) & (f) (courts must decide whether "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child"). *See In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990).[2]

At the placement stage of the Act, if parental rights have been terminated, courts are to follow the placement priorities unless there is "good cause" to the contrary. 25 U.S.C. 1915 (a) & (b). The "good cause" exception gives latitude to state courts in tailoring placements to meet the individual needs of the child. Finally, 25 U.S.C. § 1916 requires that an Indian child be returned to the parent if an adoption is set aside unless it would not be in the best interests of the child—an express direction to consider a child's interests. Thus, ICWA does not establish irrebuttable presumptions but instead provides a flexible framework designed to promote the interests of Indian children, families, and tribes.

Petitioners and the Guardian Ad Litem contend that Baby Girl's fundamental liberties have been infringed by removing her from Petitioners' custody. Pet. Br. 49; GAL Br. 53-58. Although the scope of a child's constitutional liberty interest in familial stability and continuity is an important question, the Court need not resolve that question in this case because Baby Girl's best interests were in fact the subject of lay and expert testimony and other

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[2] The meaning of "continued custody" is addressed, *infra*, at Part II(B) of this Brief.

evidence in the Family Court and were explicitly resolved in favor of custody with Father.[3]

Similarly, Birth Mother argues that her rights to due process and equal protection were violated by the courts below because Father's invocation of his parental rights under ICWA thwarted her plan to place Baby Girl with Petitioners for adoption. *See* Amica Curiae (Birth Mother) Br. 23-30. As the parent of an Indian child, Birth Mother herself could have withdrawn her consent to the adoption up until a final decree. 25 U.S.C. § 1913(a). In light of her decision to give up her parental rights, however, her standing to complain about Father's efforts to exercise his parental rights is tenuous at best. In any event, Birth Mother's argument flies in the face of the Family Court's express assessment of Baby Girl's best interests, which the court found to be promoted by custody with Father. Whatever constitutional protections are retained by a mother who relinquishes her infant for adoption, those rights do not and cannot trump the right of a fit and loving birth father to retain custody of his child when the mother is not interested in doing so.[4]

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[3] *Cf. Michael H. v. Gerald D.*, 491 U.S. 110, 132-38 (1989) (Stevens, J., concurring) (noting that Court did not need to address birth father's constitutional interests since trial court had authority under California law to consider child's best interests in ruling on birth father's request for visitation rights).

[4] In *In re T.S.W.*, 276 P.3d 133, 144-48 (Kan. 2012), by analogy, the court held that a non-Indian birth mother's wish that her Indian child be placed for adoption with a non-Indian family did not by itself override ICWA's placement preferences. The court emphasized that any adoptive placement must include a consideration of all relevant factors, including the best interests

The South Carolina Family Court in this case fully considered Baby Girl's best interests before ordering that she be placed in Father's care and custody. *See* Final Order, *Adoptive Couple v. Baby Girl*, Case No. 2009-DR-10-3803 (S. Car. Fam. Ct. Nov. 15, 2011) [hereinafter *Final Order*]. Only after receiving evidence over multiple days of hearings did the court determine that the adoption of Baby Girl could not go forward and that her best interests would be served by a transfer of custody to Father. In its Final Order, the Family Court emphasized that:

> [The birth father's] fight to gain custody of his daughter commenced when he first learned she had been placed for adoption. . . . The adoptive couple was put on notice when the child was but four months old that the birth father did not consent to the adoption, was seeking custody of his child, and the adoption would be contested. They chose to move forward with the case.

Final Order, *supra*, at 1.

Far from disregarding Baby Girl's interests, the Family Court received extensive evidence, including testimony from competing expert witnesses for Petitioners and for Father, on the child's immediate and long-term welfare. *See* Final Order, *supra*, at 2-7; *Adoptive Couple*, 731 S.E.2d at 565-66. The Family Court heard testimony explaining Father's desire to marry Birth Mother to provide a

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of the child, in deciding whether good cause exists to deviate from the placement preferences. *Id.* at 148.

home for Baby Girl, his initial hesitancy to assume parental responsibility as a single parent facing military deployment overseas, and his immediate efforts to assert his role as father once he learned of Birth Mother's adoption plans. *See* Final Order, *supra*, at 3, 17, 19. Noting that Father was stationed in Iraq for nearly one year while the adoption action was pending, the Family Court found that Father did not willfully forego his parental duties. *Id.* at 19. The Family Court credited testimony that Father "was a good father who enjoyed a close relationship with his other daughter." *Adoptive Couple*, 731 S.E.2d at 564.[5] Father and his family had "a deeply embedded relationship with the Cherokee Nation," including a proud heritage in the Wolf Clan. *Id.* at 565 n. 28. Father's expert testified that Baby Girl would "thrive" with Father's family. *Id.* at 563. While this opinion was based on the expert's experience with other Indian children who had been transitioned into Indian placements and not on statistical studies or on observations of Baby Girl or Father, the Family Court found it credible and persuasive. *Id.* at 564.

Petitioners' expert, on the other hand, testified as to the emotional trauma that Baby Girl would experience if removed from Petitioners' custody. *Id.* at 563. Based on a bonding analysis conducted with Baby Girl and Petitioners, that expert focused solely on the positive relationship Petitioners had formed with Baby Girl and the impact of removing her from

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[5] A home study conducted while Father was deployed in Iraq revealed that his family's home was "clean, safe, and appropriate," with large outdoor areas for play. 731 S.E.2d at 563.

their custody. He did not assess the potential relationship Baby Girl might develop with Father and other relatives within the Cherokee Nation. *Id.* On cross-examination, Petitioners' expert agreed that a child who had bonded successfully once could bond again. *Id.* According to the Family Court, "it was not [the expert's] opinion beyond a reasonable doubt that the child would be seriously harmed or damaged if the child were returned to birth father's custody." Final Order, *supra*, at 20; 731 S.E.2d at 563.

On a concededly mixed record, with weaknesses apparent in each expert's testimony, the Family Court concluded that Petitioners had not met their burden of proof under ICWA. 731 S.E.2d at 564.[6] The court found that Petitioners had not proven that "the child will suffer physical or emotional damage if returned to the custody of her biological father," and as a result, "ICWA prohibits termination of his parental rights." *Id.* In affirming the Family Court, the South Carolina Supreme Court noted that Father had intervened early in the litigation and that most of the bonding between Baby Girl and Petitioners had occurred *after* he had filed his objection to the adoption. *Id.* The court concluded that "the bonding that occurred during litigation, without more, cannot form the basis for

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[6] The Family Court mistakenly concluded that a "clear and convincing" evidentiary standard should apply to the question of terminating Father's parental rights, in light of *Santosky v. Kramer*, 455 U.S. 745 (1982), rather than the "beyond a reasonable doubt" standard established by 25 U.S.C. § 1912(f). *See* Final Order, *supra*, at 11. Nevertheless, the court found that Petitioners had failed to meet even the lower burden of proof that it deemed applicable. *Id.* at 22.

terminating Father's parental rights." *Id.* In this Court, the factual findings of the South Carolina courts on Baby Girl's best interests are surely entitled to deference and respect. Baby Girl has been living with Father since December 31, 2011. *Id.* at 552.

The human dimensions of this case are profound, and there are no villains. The delay in establishing the applicability of ICWA was apparently due to innocent mistakes by all parties, including Birth Mother. *See Adoptive Couple,* 731 S.E.2d at 554-555. Had Father's membership in the Cherokee Nation been confirmed at the outset, the custody dispute over Baby Girl could have proceeded in full compliance with ICWA and might never have been transferred to South Carolina. Final Order, *supra,* at 4-5; 731 S.E.2d at 559. But what is most significant, and undisputed, is that Father objected promptly once he did receive notice of the planned adoption and has been steadfast since then in his claim of paternity and in his desire to raise his daughter. Had Father not objected immediately upon learning of the adoption, the outcome in the courts below likely would have been quite different. When a birth father delays unreasonably in asserting parental rights until long after receiving notice of a pending adoption, courts have construed ICWA to not require that the adoption be set aside.[7] In that circumstance, the interests of the child and the

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[7] *See, e.g., In re Adoption of Baade,* 462 N.W.2d 485 (S.D.1990) (where birth father knew of pending adoption and made no effort to object until child had been living with adoptive parents for over two years, court found that grant of custody to father would result in serious emotional or physical harm to child).

adoptive parents in protecting the established family may be paramount.[8] Here, however, Father acted quickly and responsibly, even as he was preparing to deploy for Iraq, when he learned for the first time that Birth Mother had relinquished Baby Girl to Petitioners for adoption. *See Adoptive Couple*, 731 S.E.2d at 555.

Moreover, in the instant case, the interests of the child, father, and tribe coincide. The Family Court found that both the interests of Father and Baby Girl would be furthered by his assuming full parental custody of the child. Final Order, *supra*, at 22. The South Carolina Supreme Court emphasized, as well, that "in transferring custody to Father and his family, Baby Girl's familial and tribal ties may be established and maintained in furtherance of the clear purpose of the ICWA, which is to preserve American Indian culture by retaining its children within the tribe." *Adoptive Couple*, 731 S.E.2d at 566.

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[8] *See In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988) (barring challenge by a putative Indian father who did not acknowledge or establish paternity until after the final adoption order was entered, 21 months after the child was placed for adoption); *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz. Ct. App. 1983) (rejecting challenge by a putative Indian father and tribe where the father did not acknowledge paternity until three years after the child's birth and just one month before a final decree of adoption was entered).

B. The Indian Child Welfare Act Is Tied To Tribal Membership And Furthers A Core Congressional Concern For The Survival Of American Indian Tribes.

In enacting ICWA's framework for protecting Indian children, families, and tribes, Congress explained that the Act was an exercise of the federal government's "plenary power over, and responsibility to, the Indian and Indian tribes," and was intended to address "the failure of state officials, agencies, and procedures to take into account the special problems and circumstances of Indian families." H. Rep. No. 95-1386 at 19. In exercising this plenary power, Congress was careful to require that an "Indian child" either be a member of a federally-recognized tribe or be eligible for membership in a federal recognized tribe and the child of a tribal member. 25 U.S.C. § 1903(4).

Tribes have diverse approaches to defining membership. The Cherokee Nation requires that members be lineal descendants of tribal members. *See* Constitution of Cherokee Nation of Oklahoma Art. III (1999). *See generally* Cohen's Handbook of Federal Indian Law 174-75 (Nell Jessup Newton ed. LexisNexis 2005); Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. Kan. L. Rev. 437 (2002). A tribe's right to define its own membership is a key element of tribal autonomy. As this Court acknowledged the same year that ICWA became law, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

In this case, Father is a member of the Cherokee Nation and Baby Girl is eligible for membership. ICWA is applicable here not because of their race but because of their political status with a federally recognized Indian tribe. For decades this Court has recognized that legislation benefitting federally recognized Indian tribes and their members is a classification based on political association rather than race and is therefore subject only to rational basis review. *See Morton v. Mancari*, 417 U.S. 535, 554 (1974). In *Morton*, this Court explained that "[t]he [BIA's hiring] preference . . . is granted to Indians, not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* The *Mancari* approach was followed in *Fisher v. District Court*, 424 U.S. 382 (1976) (per curiam), a pre-ICWA case in which the Court upheld a rule of exclusive tribal jurisdiction in an adoption dispute between tribal members. *Accord, United States v. Antelope*, 430 U.S. 641, 645-48 (1977).

Despite Petitioners' contentions to the contrary, Pet. Br. at 44, *Rice v. Cayetano*, 528 U.S. 495 (2000), does not support an interpretation of ICWA as race-driven but, rather, supports just the opposite conclusion. In that case, the Court struck down an electoral scheme in Hawaii that restricted certain voting rights to "Native Hawaiians" as determined by ancestry. In holding that the scheme was an impermissible racial classification in violation of the Fifteenth Amendment, the Court distinguished the many federal laws and regulations that favor members of recognized Indian tribes and, citing *Morton* and *Antelope*, reaffirmed the authority

of Congress to make precisely the type of political classifications that ICWA makes. *Id.* at 520, 530-32.

A core purpose of ICWA is to strengthen Indian tribes. The protections afforded by ICWA are triggered by tribal membership rather than race. Accordingly, the Act is constitutional because its provisions are "reasonable and rationally designed to further Indian self-government." *See Morton*, 417 U.S. at 555; *Antelope*, 430 U.S. at 645-48.

II. THE ADOPTION DISPUTE REGARDING BABY GIRL FALLS SQUARELY WITHIN THE SCOPE OF CONGRESSIONAL CONCERNS THAT PROMPTED PASSAGE OF THE INDIAN CHILD WELFARE ACT.

Fundamental goals of ICWA would be thwarted if state courts could exclude from its protections cases such as this one, involving a father who may have fallen short of the mandates of state law but nevertheless acted promptly to secure his parental rights in accordance with ICWA. Petitioners have not disputed that, for purposes of ICWA's coverage, the attempted adoption of Baby Girl in South Carolina was a "child custody proceeding," *see* 25 U.S.C. § 1903(1); that the Cherokee Nation is an "Indian tribe," *see* 25 U.S.C. § 1903(8); or that Baby Girl is an "Indian child," *see* 25 U.S.C. § 1903(4).

Similarly, Father clearly meets the definition of "parent" under ICWA. The Act defines "parent" as follows:

> "Parent" means any biological parent or parents of an Indian child or any Indian

> person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established.

25 U.S.C. § 1903(9). The South Carolina courts correctly concluded that Father, who was not married to Birth Mother, was a "parent" under ICWA because he both acknowledged and established paternity (through DNA testing) and objected to the adoption of Baby Girl as soon as he became aware of Birth Mother's plan. *See Adoptive Couple*, 731 S.E.2d at 555-56.

Petitioners, however, argue that "parent" must be defined by reference to state law, and that "acknowledged or established" should similarly be read to include state law limitations, because otherwise the phrase adds no meaning to the definition. Pet. Br. 19-29. In Petitioners' view, Father was not entitled to object to his daughter's adoption under South Carolina law and should therefore be excluded from the definition of "parent" under federal law. *Id.* at 22-29. As noted by the South Carolina Supreme Court, Petitioners' arguments conflate the definition of "parent" with the restrictions on putative fathers entitled to object to adoptions. *Adoptive Couple*, 731 S.E.2d at 560. As Father both acknowledged and established his paternity, he clearly satisfied the definition of "parent" under ICWA.

A. The Meaning Of "Parent" As Used In ICWA Is A Matter Of Federal Rather Than State Law And Must Be Determined By Reference To The Statutory Definition, The Structure Of The Act, And The Underlying Congressional Goals.

In enacting ICWA pursuant to its constitutional powers under Article I, Section 8, Congress intended to protect tribal members and tribes from practices rooted in state law. *See* H.R. Rep. No. 95-1386, *supra*, at 13-14. The unique history of ICWA both explains and supports a federal remedial scheme of nationwide application, one that does not incorporate local limitations on parental status. Indeed, reliance on state law to define the meaning of the term "parent" in ICWA would undermine the purpose of the Act and frustrate the exercise of the federal rights it was meant to provide. *See Holyfield*, 490 U.S. at 43-44.

In *Holyfield*, the Court rejected the argument that the term "domicile" as used in ICWA should be defined according to state law. *Id.* at 44-47. Noting that the Act was designed to protect "the rights of Indian families and Indian communities vis-à-vis state authorities," *id.* at 45, the Court emphasized that "Congress perceived the States and their courts as partly responsible for the problem it intended to correct." *Id.* Under the circumstances, the Court found it "most improbable" that Congress meant to leave the scope of tribal jurisdiction to be determined as a matter of state law. *See also id.* at 44 ("the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary.")

Similarly, the meaning of the term "parent" must be defined according to federal standards in order to effectuate the congressional purpose. The aim of the Act was to establish "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian cultures." 25 U.S.C. § 1902. The legislative history makes clear that Congress was concerned about destructive state practices in both voluntary and involuntary proceedings. Based on the extensive testimony offered during the congressional hearings on the Act, Congress found that Indian children were often removed from Indian parents and Indian tribes with little regard for procedural safeguards. H.R. Rep. No. 95-1386, *supra*, at 11. Congress reported that "[m]any cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children." *Id.*

Having found that state law contributed to the unwarranted removals of Indian children from their families and tribes, Congress could not have intended to incorporate state laws that facilitate the severance of the rights of Indian parents in the context of adoption. In certain circumstances, South Carolina law dispenses with the requirement of parental consent of an unwed father. *See, e.g.*, S.C. Code Ann. § 63-9-310(A)(5) (consent not required if father neither lived with child's mother and acknowledged paternity nor provided financial support to birth mother). Although such a law may facilitate the adoption of children, it ignores the remedial purposes of ICWA, which was enacted expressly to halt the

state practices that were destroying Indian families and tribes. *Holyfield*, 490 U.S. at 45-46. In light of that goal, the meaning of "parent," as well as the procedural and substantive protections for parents provided by the Act, *see* 25 U.S.C. §§ 1911-16, 1921, must be read to supplant state laws that would ignore the evils that ICWA was designed to ameliorate and would weaken its safeguards.

Petitioners argue that the two sentences in the definition of "parent" in ICWA do not carry independent meaning unless the second sentence is interpreted as a reference to state law standards. Pet. Br. 19-29. Petitioners are mistaken in their construction of the definition and in their reading of the legislative history. The first sentence makes clear that biological parents of an Indian child as well as Indian adoptive parents are included within the definition of "parent." The second sentence is intended to exclude unmarried fathers who do not take steps to acknowledge or establish their paternity before or during any pending child custody proceeding within the meaning of ICWA. Thus, an unwed biological father whose paternity is neither established nor acknowledged is not a "parent" under ICWA.[9] Clearly, the second sentence demonstrates a deliberate decision to bar states from excluding putative fathers who, like Father here, acknowledge and establish their paternity at an early opportunity in the proceeding.

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[9] *See In re Daniel M.*, 110 Cal. App.4th 703, 1 Cal.Rptr.3d 897 (Ct. App. 4th Dist. 2003) (putative father who did not acknowledge or establish paternity did not have standing to appeal claimed violation of ICWA notice provisions).

The legislative history of ICWA shows that Congress was aware of this Court's nascent jurisprudence on the constitutional rights of unwed fathers. In the accompanying House Report, Congress explained that "the last sentence [in the definition of "parent"] is not meant to conflict with the decision of the Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972)." H.R. Rep. 95-1386, *supra*, at 21. In *Stanley*, the Court held that an unwed father's rights to due process and equal protection were violated when he was conclusively presumed to be an unfit parent under state law at the death of his children's mother.[10] Petitioners and Guardian Ad Litem argue that the reference to *Stanley* narrows the universe of unwed fathers eligible to invoke ICWA. Pet. Br. 24-27; GAL Br. 35-38. However, just the opposite is true. The reference to *Stanley* in the House Report shows that Congress wanted to include unwed fathers under ICWA's umbrella. It cannot possibly mean that Congress wanted to engraft this Court's post-*Stanley* precedents on to the straightforward definition of "parent" in Section 1903.[11] In this case, of course, Father is not relying on the Due Process Clause but instead on rights grounded in ICWA. Under the

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[10] The Court held that that "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws." 405 U.S. 645, 649 (1972).

[11] The cases addressing unwed fathers' rights post-*Stanley* include *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

strict criteria of ICWA, Father did not voluntarily relinquish his daughter for adoption, nor was there a basis for involuntarily terminating his parental rights.

The text of ICWA supports the position that Congress did not intend in its definition of "parent" to incorporate state law limitations on a father's standing to object to an adoption. The statutory definition in 25 U.S.C. § 1903(9) conspicuously omits any reference to state law. Congress, however, did refer to state law in another definition. Notably, "Indian custodian" is defined to mean "any Indian person who has legal custody of an Indian child under tribal law or custom or *under State law*. . . ." 25 U.S.C. § 1903(6) (emphasis added). By having included the reference to state law in one definition but not another, Congress evinced its intent that the definition of "parent" should stand alone as a federal standard. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (selective use of language in different sections of same statute is presumed to be intentional).

Moreover, ICWA expressly refers to state law in a separate section that clarifies the intended preemptive impact of the Act. Section 1921 requires courts to apply any state or federal law that increases the protection for parental rights beyond the standards provided in the Act. *See* 25 U.S.C. § 1921 (court shall apply state or federal law that provides "a higher standard of protection to the rights of the parent . . . than the rights provided under this subchapter"). Congress thus saw ICWA as a floor but not a ceiling. Surely, a state law that cuts off an unwed Indian father's standing to assert

paternity provides a lower standard of protection for his rights than the federal Act and must be disregarded.

B. Because This Case Involved The Attempted Adoption Of An Indian Child Protected By ICWA, The Courts Below Had To Find Either That The Indian Father Voluntarily Consented To The Adoption In Accordance With ICWA Or That The Father's Parental Rights Were Subject To Termination Under ICWA.

Wanting to halt the destructive practices by state child welfare authorities, Congress imposed strict standards for the voluntary and involuntary terminations of parental rights in proceedings involving Indian children. In this case, the only "consent" document that Father ever signed was "a one-page 'Acceptance of Service'" handed to him by a process server just days before being deployed for Iraq. *Adoptive Couple*, 731 S.E.2d at 561. The courts below acted properly in concluding that the father's "consent" did not meet the requirements of the Act and that grounds for termination under ICWA similarly did not exist.

To ensure that parents of Indian children act without coercion or duress and with full understanding of the meaning of a consensual relinquishment, Congress spelled out in detail the nature of the required consent. The Act mandates that consent be in writing and recorded before a judge, that the judge certify that the terms and consequences of the consent were fully understood by the parent, and that the explanation of the consequences of the consent be in English or

interpreted into a language that the parent understood. *See* 25 U.S.C. § 1913(a). To be valid, the consent cannot be given earlier than ten days after the birth of the child. *See id.* In addition, in any voluntary proceeding for termination of parental rights or adoptive placement, a parent's consent may be withdrawn for any reason at any time prior to the final decree of termination or adoption. *See* 25 U.S.C. §1913(c). This parental prerogative applies to any parent of an Indian child, whether or not the parent is a tribal member. Thus, Birth Mother could have withdrawn her own consent to adoption up until the time of a final decree.

These federal requirements diverge from typical state law adoption statutes in important respects. State consent statutes often require that consents simply be sworn or acknowledged, without the need to appear in court to receive a judicial explanation of the consequences. *See, e.g.*, Mass. Gen. Laws ch. 210, § 2 (requiring written consent to be attested to and subscribed before notary in presence of two witnesses); Or. Rev. Stat. § 109.312 (requiring consent to be in writing). Once validly given, consents generally cannot be withdrawn except on the grounds of undue influence, fraud, or duress. In light of the unique history endured by Indian children, parents, and tribes, Congress heightened the protections to ensure that relinquishments of Indian children would be truly voluntary and based on a full understanding of the legal consequences of the consent. In this case, the parties do not dispute that a valid consent in accordance with 25 U.S.C. § 1913(a) from Father was never obtained.

Absent a voluntary relinquishment of Father's parental rights in accordance with ICWA, the only other route to an adoption of Baby Girl was an involuntary termination of his parental rights. As the South Carolina Supreme Court found, the strict standards of ICWA for involuntary termination were not met here. *Adoptive Couple*, 731 S.E.2d at 565. *Adoptive Couple*, 731 S.E.2d at 565. In Section 1912, Congress established clear criteria to govern the "termination of parental rights," which the Act defines as "*any* action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(i)(ii) (emphasis added). Thus, Section 1912 applies to all involuntary terminations, including those where, as here, the parent did not previously have custody of the child. Specificaily, the Act bars a severance of parental rights unless and until "active efforts" have been made to prevent the breakup of the Indian family. *See* 25 U.S.C. § 1912(d). In addition, any termination of parental rights must be "supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *See* 25 U.S.C. §1912(f).

The courts below appropriately held that ICWA's strict standards for terminating the rights of a parent of an Indian child were not met in this case.[12] No efforts were made to meet the requirement

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[12] In light of its holding that ICWA's standards for terminating parental rights were not met, the South Carolina Supreme Court did not address any grounds for termination under state law. *Adoptive Couple*, 731 S.E.2d at 565. The Family Court, however, did reach the issue and concluded that Petitioners had

of Section 1912(e) to prevent the breakup of Father's relationship with his daughter. As the United States points out, that is a sufficient basis to affirm the judgment below. U.S. Br. 20-23.

In addition, Section 1912(f) elevates the standard for severance of parental rights of Indian children to proof beyond a reasonable doubt. The South Carolina courts concluded that Petitioners had failed to show that "continued custody" of Baby Girl by Father would result in harm sufficient to meet the statutory standard. *Adoptive Couple*, 731 S.E.2d at 562-65. Petitioners contend that the reference to "continued custody" requires that a parent be presently exercising custodial rights under state law in order to invoke the protections of Section 1912. Pet. Br. 33-35. Petitioners' view, apparently shared by the United States, U.S. Br. 23-26, ignores the structure of §1912 and would be an illogical interpretation of the statute. Such a construction would exclude a large category of Indian children from coverage under ICWA—a result that Congress could not have intended.[13] The only logical reading of § 1912(f) is that it applies to all termination of parental rights proceedings involving an Indian

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not established any state law grounds for severing Father's rights. *See* Final Order, *supra*, at 18-20.

[13] "It is unreasonable to suppose that Congress intended to provide no substantive standard and no burden of proof for [termination of parental rights] cases in which the parent does not have physical custody of the child." *In re Termination of Parental Rights to Vaughn R.*, 770 N.W.2d 795, 802-03 (Wis. Ct. App. 2009); *accord D.J. v. P.C.*, 36 P.3d 663, 670, 672 (Alaska 2001); *In re Adoption of Baade*, 462 N.W.2d 485, 490 (S.D. 1990); *In re Welfare of W.R.*, 379 N.W.2d 544, 549 (Minn. Ct. App. 1985).

child, including those who may not be in, or who may never have been in, the physical custody of the Indian parent.

If a birth mother seeks to place her child for adoption before the father has had an opportunity to establish a relationship with his son or daughter, Petitioners' reading of ICWA would foreclose the father's rights irrevocably. Surely Congress did not intend to exclude those fathers (and their children) from ICWA's protections. For that reason, "continued custody" logically refers to preexisting parental rights and responsibilities -- even in the absence of physical custody -- that a parent retains until voluntarily relinquished or judicially terminated under the standards set forth in ICWA. *See* Bureau of Indian Affairs, U.S. Dep't of the Interior, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67593 (Nov. 26, 1979) (hereinafter BIA Guidelines).

In enacting Section 1912(f), Congress intended to establish a general federal evidentiary standard for termination of parental rights as to Indian children, *see* House Rep. No. 95-1386, *supra*, at 22, and state courts interpreting ICWA have properly understood it that way. *See, e.g., Idaho Dept. of Health & Welfare v. Doe*, 275 P.3d 23 (Idaho 2012) (applying standard of § 1912 to termination of parental rights of Indian father who was serving lengthy prison sentence); *In re M.F.*, 225 P.3d 1177 (Kan. 2010) (applying standard of § 1912 to termination of parental rights where child had been in state custody since birth due to serious medical issues).

As detailed in Part I(A) of this Brief, the thoughtful assessment of Baby Girl's interests by the Family Court, based on an extensive factual record, support the conclusion that the rigorous standards of Section 1912 were not satisfied.

C. The "Existing Indian Family Doctrine," A Judge-Made Exception To ICWA That Has Been Losing Support In State Courts In Recent Years, Is Inconsistent With The Language And Purpose Of The Indian Child Welfare Act And Was Properly Rejected In This Case By The South Carolina Courts.

The plain language of ICWA makes it clear that the attempted adoption of Baby Girl by Adoptive Couple is governed by the Act. Petitioners urge, however, that the Act should not be applied as written because Baby Girl was born to a non-Indian mother who chose to relinquish the child for adoption at birth. In that regard, Petitioners rely on a version of the "existing Indian family doctrine." Pet. Br. 51-54. The doctrine is a judge-made exception to ICWA that has no support in the language or legislative history of the Act and is inconsistent with the fundamental policy of tribal self-determination.

Petitioners do not dispute that Baby Girl is an "Indian child" within the meaning of ICWA. *See* 25 U.S.C. § 1903(4) ("Indian child" means any unmarried person under the age of eighteen who is either a member of an Indian tribe or is eligible for membership and is the biological child of a member). Nevertheless, Petitioners urge that the Act does not apply because Baby Girl was born to a non-Indian

mother and placed for adoption at birth, and thus was never a member of an Indian family.

Nothing in ICWA requires that a child be part of an ongoing Indian family unit, or actively involved in tribal life, before the Act governs. The definitional sections turn on tribal membership—or eligibility for membership—and do not impose additional requirements. *See* 25 USC §§ 1903(4) ("Indian child"); 1903(9) ("parent"). Because Congress carefully defined the nature of the relationship between an Indian child and a tribe required to trigger application of the Act, "judicial insertion of an additional criterion for applicability is plainly beyond the intent of Congress." *In re A.J.S.*, 204 P.3d 543, 550 (Kan. 2009), quoting *Baby Boy C.*, 27 A.D.3d 34, 47 (N.Y. App. Div. 2005). Moreover, while Congress was primarily focused on involuntary separations of Indian children from their Indian families, it also acknowledged that under prevailing practices some Indian children would never experience their tribal culture. H. R. Rep. No. 95-1386, *supra*, at 20. Congress wanted to protect Indian children who, as minors, lacked the capacity themselves to initiate an enrollment process and take advantage of the cultural and property benefits flowing from enrollment. *Id.* at 17.

In the few courts that continue to apply the existing Indian family doctrine, its contours are ill-defined. Some courts use an inherently subjective test to determine whether the child and parents lack a "significant social, cultural or political relationship with their tribe." *See In re Bridget R.*, 41 Cal. App. 4th 1483, 1492 (Cal. App. 2d Dist. 1996). Others have limited it to cases in which an unmarried non-

Indian mother voluntarily relinquishes the child. *See, e.g., Ex Parte C.L.J.*, 946 So.2d 880 (Ala. Civ. App. 2006). Still others have applied the doctrine when neither the Indian parent nor tribe contests the child's placement. *In re Parental Rights as to N.J.*, 221 P.3d 1255, 1264 (Nev. 2009). The Kansas Supreme Court, which created the "existing Indian family doctrine" in *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), overruled that decision in *In re A.J.S.*, 204 P.3d 543 (Kan. 2009). Concluding that the doctrine was illogical and inconsistent with the statutory text and purpose, the court announced that abandonment of the doctrine was "the wisest future course." *Id.* at 549.

The legislative history of ICWA lends no support to the "existing Indian family doctrine." Congress recognized that a young Indian child who loses all connection with his or her tribe cannot retrieve it in adulthood; it is gone forever. H.R. Rep. No. 95-1386, *supra*, at 17. Indian children, by virtue of their childhood, cannot voice a desire to become full and active members of their tribes. As adults, tribal members have the right to leave the tribal community if they so desire, but that is their choice. The existing Indian family doctrine takes that choice from the child irrevocably.[14]

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[14] Significantly, Congress rejected an earlier version of ICWA that would have required that an Indian child not living on a reservation have "significant contacts" with the tribe. *See* Indian Child Welfare Act, S. 1214, 95th Cong., 1st Sess., § 102(c) (1977), *cited in* S.Rep. No. 95-597, 95th Cong., 1st Sess., at 4 (1977); *Michael J. v. Michael J.*, 7 P.3d 960, 964 (Ariz. Ct. App. 2000).

The "existing Indian family doctrine" is fundamentally at odds with a tribe's right to determine its own membership, a key element of tribal sovereignty and tribal self-determination. A tribe sustains its cultural and political identity through the power to define and maintain membership criteria. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). A state court that presumes to assess the "Indianness" of a child for purposes of applying ICWA is intruding on a core element of tribal self-determination,[15] and is acting in a manner wholly inconsistent with the overarching purposes of ICWA.

By affirming the South Carolina Supreme Court, this Court can send an important message to the states that the protections of ICWA for Indian children, families, and tribes do not depend on the vagaries of state law or the unpredictable contours of a judge-made exception to the Act.

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[15] According to the BIA Guidelines, "[i]t is the tribe's prerogative to determine membership criteria and to decide who meets those criteria," and a tribe's determination that a child is a member or eligible for membership should be deemed "conclusive." *See* BIA Guidelines for State Court, *supra*, at 67586.

CONCLUSION

The judgment below should be affirmed.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, a minor child under the age of fourteen years, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF OF THE STATES OF ARIZONA, ALASKA, CALIFORNIA, COLORADO, CONNECTICUT, GEORGIA, IDAHO, ILLINOIS, MAINE, MICHIGAN, MISSISSIPPI, MONTANA, NEW MEXICO, NEW YORK, NORTH DAKOTA, OREGON, WASHINGTON AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS BIRTH FATHER AND THE CHEROKEE NATION

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INTEREST OF THE AMICI CURIAE STATES

Amici States share a compelling parens patriae interest in protecting children. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). To advance that interest, States have enacted laws to promote the prompt establishment of paternity for children born out of wedlock and to secure adoptions for those children whose parents cannot parent them or chose to relinquish them. In cases involving Indian children as defined by the federal Indian Child Welfare Act, 25 U.S.C. §§ 1901 through 1963 (ICWA or the Act), state courts are charged with protecting the rights of Indian children and tribes and, in doing so, are tasked with interpreting and applying ICWA to child-custody proceedings.

States and tribes have collaborated to ensure that the mandates and spirit of ICWA are fulfilled. *See* U.S. Gov't Accountability Office, GAO-05-290, Indian Child Welfare Act (2005) at 28-29 (outlining various levels of cooperation among state and tribal entities regarding child-welfare policies). As of 2005, twenty-three States reported having a partnership agreement with a tribe or tribes. *Id.* at 49. The amici States are therefore interested in ensuring that state procedures for adoptions meet ICWA requirements.

In this case, the South Carolina Supreme Court held that Respondent Birth Father had met ICWA's statutory definition of "parent" and therefore had "standing to invoke the protection of ICWA." *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 559 (S.C. 2012). The court rejected the so-called "existing Indian family" exception to ICWA, *id.* at 559 n.17, and Petitioners'

claim that Father did not qualify as a "parent" under ICWA because he had not met state-law requirements for establishing paternity, *id.* at 560. The court held that Father had "met the ICWA's definition of 'parent' by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establishing his paternity through DNA testing," and thus met "all that is required under the ICWA" to acknowledge or establish paternity. *Id.* at 560.

Because the existing Indian family exception is contrary to ICWA and because allowing unwed fathers to acknowledge or establish paternity through well-accepted and prompt action is consistent with ICWA and with the States' interest in ensuring safe and stable adoptions under state law, amici States urge the Court to affirm the decision of the South Carolina Supreme Court.

SUMMARY OF THE ARGUMENT

Congress enacted ICWA to address its concerns about the removal of Indian children from their families and tribes, their placement with families not connected to the children's Indian culture, and the continued existence of tribes without access to future generations. 25 U.S.C. § 1901(3), (4). Consequently, ICWA provides "minimum Federal standards" to ensure that the rights of Indian children, their parents, and their tribes are acknowledged and respected in child-custody proceedings. 25 U.S.C. § 1902.

The judicially created existing Indian family exception to ICWA is contrary to most States' statutory

or decisional law because it cannot be squared with ICWA's language. The Act protects Indian children, their parents, and their tribes regardless of the Indian parent's custodial status. As a result, a non-Indian mother placing an Indian child for adoption must still comply with ICWA's placement preferences or demonstrate good cause to deviate from them. *See* 25 U.S.C. § 1915(a). By enacting ICWA, Congress established a presumption that placement according to ICWA's placement preferences served Indian children's best interests. The Act also affords rights to the Indian child's tribe, and a non-Indian mother cannot unilaterally abrogate those rights even when she has sole custody of the Indian child.

And the existing Indian family exception is contrary to ICWA's purpose and objectives. Thus the twenty States that have rejected the exception have recognized that Congress enacted ICWA to stem the tide of forced assimilation of Indian children. These States properly look to the tribe as the sole authority to determine whether the child is a member of the tribe or is eligible for membership.

The Act's rights are guaranteed to the "parent" of an Indian child. The Act defines parent to include an unwed father only if he has "acknowledged or established" paternity. 25 U.S.C. § 1903(9). The South Carolina Supreme Court correctly concluded that Father is a parent under ICWA. As long as a father has taken timely, affirmative steps to indicate his interest in and ability to parent his child, he has sufficiently "acknowledged or established" paternity under ICWA. Here, Father filed a written acknowledgment of paternity as soon as he realized

that Baby Girl had been placed for adoption and confirmed his biological paternity through DNA testing. By acknowledging and establishing paternity, an unwed father secures the right to a hearing to determine whether he is entitled under ICWA to have the child placed with him.

By allowing interested and able fathers to come forward and secure ICWA's protections, States further ICWA's purpose in preventing the unwarranted wholesale removal of Indian children from their tribes and families and ensuring that adoptions of Indian children cannot later be undone because of the failure to meet one of ICWA's requirements. Early and complete compliance with ICWA ensures the security and stability of adoptive families as well as tribes and Indian families. Accordingly, this Court should affirm the South Carolina Supreme Court's holding rejecting the existing Indian family exception and recognizing that Father had established and acknowledged paternity under ICWA.

ARGUMENT

I. The Act Applies to Proceedings Involving an Indian Child Regardless of the Child's Membership in an "Existing Indian Family" or the Parent's Custodial Status.

A. Twenty States Have Correctly Rejected the Existing Indian Family Exception Because It Is Inconsistent with the Language and Purpose of ICWA.

In 1982, the Kansas Supreme Court created what would come to be known as the "existing Indian family" exception to ICWA. *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982). In *Baby Boy L.*, the court interpreted ICWA to "set minimum standards for the removal of Indian children from their existing Indian environment" but not to protect "an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be." 643 P.2d at 175. Thereafter, other States adopted the exception.[1]

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[1] *See S.A. v. E.J.P.*, 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990); *Matter of Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257, 263 (Ky. 1996); *Hampton v. J.A.L.*, 658 So.2d 331, 334-35 (La. App. 1995); *In Interest of S.A.M.*, 703 S.W.2d 603, 608-09 (Mo. App. 1986); *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *Matter of Baby Boy D.*, 742 P.2d 1059, 1064 (Okla. 1985); *Claymore v. Serr*, 405 N.W.2d 650, 654 (S.D. 1987); *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880 at *16 (Tenn. App. Nov. 19, 1997); *In re Adoption of Crews*, 825 P.2d 305, 310 (Wash. 1992). However, the Alabama and Indiana courts subsequently determined that the exception did not apply when the child's mother was Indian. *See Ex parte C.L.J.*, 946 So. 2d 880, 889 (Ala. Civ. App. 2006), and *Matter of D.S.*, 577 N.E.2d 572, 574

Most States that have addressed the existing Indian family exception have rejected it from the outset, either legislatively (Iowa, Minnesota, and Wisconsin)[2] or judicially (Alaska, Arizona, Colorado, Idaho, Illinois, Michigan, Montana, New Jersey, New York, North Dakota, Oregon, and Utah).[3] The California Legislature eliminated the existing Indian family exception by statute, replacing an earlier statute that had been held unconstitutional by one division of its appellate court. Cal. Welf. & Inst. Code § 224(c), replacing Cal. Welf. & Inst. Code § 360.6(c); *see In re Santos Y.*, 112 Cal. Rptr.

(Ind. 1991), respectively. The Oklahoma and Washington legislatures abrogated the existing Indian family exception. *See* Okla. Stat. Ann. tit. 10 §§ 40.1, 40.3(B); Wash. Rev. Code Ann. § 13.34.040(3) (formerly at Wash. Rev. Code Ann. § 13.04.060), respectively. And the courts of South Dakota and Kansas rejected it through superseding court opinions. *See In re Adoption of Baade*, 462 N.W.2d 485, 489-90 (S.D. 1990); *In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009).

[2] *See* Iowa Code Ann. § 232B.5(2); Minn. Stat. Ann. § 260.771(2); Wis. Stat. Ann. § 938.028(3)(a).

[3] *See In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *Michael J. Jr. v. Michael J. Sr.*, 7 P.3d 960, 963-64 (Ariz. App. 2000); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832, 839 (Ill. App. 1993) (rev'd on other grounds by *Adoption of S.S.*, 657 N.E.2d 935 (Ill. 1995) (*S.S. II*)); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932-33 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 322-23 (N.Y. App. Div. 2005); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *Quinn v. Walters*, 845 P.2d 206, 208-09 (Or. App. 1993) (*Quinn I*) (rev'd on other grounds by *Quinn v. Walters*, 881 P.2d 795 (Or. 1994) (*Quinn II*)); *D.J.C. v. P.D.C.*, 933 P.2d 993, 999 (Utah App. 1997).

2d 692 (Cal. App. 2001). Previously, California courts had been split regarding the applicability of the existing Indian family exception, with some appellate districts applying it under certain circumstances,[4] while others rejected it[5] or were split.[6] Since the legislature acted, no California court has expressly applied the existing Indian family exception, but the court has acknowledged its inapplicability. *In re Vincent M.*, 59 Cal. Rptr. 3d at 323.

The Arizona Court of Appeals explained several reasons for joining the growing number of jurisdictions that rejected the judicially created exception. *Michael J. Jr.*, 7 P.3d at 963-64. In addition to other reasons, the court found that "[a]dopting an existing Indian family exception frustrates the policy of protecting the tribe's interest in its children" and "the interests of Indian children," "the language of ICWA contains no such requirement or exception," and ICWA's legislative history supports the "decision not to impose an existing Indian family requirement." *Id.* The Arizona Court of Appeals and the other state courts and legislatures that have rejected the existing Indian family exception have correctly concluded that it is inconsistent with ICWA's language and purpose.

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[4] *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. App. 1996).

[5] *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 686 (Cal. App. 1996); *In re Suzanna L.*, 127 Cal. Rptr. 2d 860, 868 (Cal. App. 2002).

[6] *In re Adoption of Lindsay C.*, 280 Cal. Rptr. 194, 201 (Cal. App. 1991); *In re Adoption of Hannah S.*, 48 Cal. Rptr. 3d 605, 610 (Cal. App. 2006); *In re Alicia S.*, 76 Cal. Rptr. 2d 121, 129 (Cal. App. 1998); *In re Vincent M.*, 59 Cal. Rptr. 3d 321, 323 (Cal. App. 2007).

B. The Existing Indian Family Exception Is Contrary to ICWA's Provisions that Protect Indian Children, Their Parents, and Their Tribes Regardless of the Parent's Custodial Status.

Limiting ICWA's protections to those who demonstrate that an Indian child comes from an "existing Indian family" ignores ICWA's plain-language provisions regarding rights afforded to the tribe, the child, and to the "parent" without regard for the parent's custodial status.

The Act defines an "Indian child"[7] and a "parent."[8] It does not define or use the term "Indian parent" or otherwise differentiate between the rights of the parents when one parent is Indian and the other is not. *See, e.g., In re T.S.W.*, 276 P.3d 133, 143 (Kan. 2012); *K.N. v. State*, 856 P.2d 468, 474 n.8 (Alaska 1993); *In re Jonathon S.*, 28 Cal. Rptr. 3d 495, 498 (Cal. App. 2005). It is the child's status as an "Indian child" that determines ICWA's applicability.[9]

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[7] An "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4).

[8] A "parent" is "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9).

[9] *See, e.g.*, 25 U.S.C. §§ 1911(a) (exclusive tribal jurisdiction for "any child custody proceeding involving an Indian child"); 1911(b),

The Indian child has rights in addition to those of his custodial parent. For example, ICWA requires that in "*any* adoptive placement of an Indian child under State law," preference must be given to a member of the child's extended family, tribe, or other Indian families, unless good cause is shown to deviate from those preferences. 25 U.S.C. § 1915(a) (emphasis added). Those placement preferences are "[t]he most important substantive requirement imposed on state courts." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36 (1989). Thus, ICWA creates a "statutory presumption that placement consistent with ICWA preferences is in the best interests of the child." *Navajo Nation v. Ariz. Dep't of Econ. Sec.*, 284 P.3d 29, 36 (Ariz. App. 2012); *accord In re C.H.*, 997 P.2d 776, 780 (Mont. 2000); *Matter of Custody of S.E.G.*, 521 N.W.2d 357, 362 (Minn. 1994); *Matter of K.R.C.*, 238 P.3d 40, 48 (Or. App. 2010); *People ex rel. A.R.*, No. 11CA1448, 2012 WL 5457416, at *3 (Colo. App. Dec. 27, 2012).

There is no exception to ICWA's placement preferences for a placement selected by a non-Indian

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(c) (transfer of jurisdiction of and right of intervention in State court proceedings regarding "an Indian child"); 1912(a) (notice required in involuntary proceedings involving "an Indian child"); 1912(c) (examination of records of "proceeding[s] under State law involving an Indian child"); 1912(d) (active efforts must be made to prevent the breakup of an Indian family in any proceeding for "foster care placement of, or termination of parental rights to, an Indian child"); 1913(c) (withdrawal of consent for a voluntary termination of parental rights to an Indian child); 1915 (placement preferences for Indian children); 1922 (emergency removal of Indian children).

mother, regardless of her custodial status. *See Holyfield*, 490 U.S. at 40 n.13 (noting that the state court had failed to apply ICWA's adoptive placement preferences in a voluntary adoption proceeding). The language of the statute is clear: if the child is an "Indian child," then the party placing the child must meet the placement preferences or demonstrate good cause to deviate from them. 25 U.S.C. § 1915; *see also* The Bureau of Indian Affairs' *Guidelines for State Courts; Indian Child Custody Proceedings* (hereinafter BIA Guidelines) F.3(b), 44 Fed. Reg. 67,584, 67,594 (1979). That is true whether the State, or the unwed mother, is the legal custodian of the Indian child.[10]

A parent's preference for a particular placement is only one factor to consider in determining whether good cause exists to deviate from ICWA's placement preferences. *See* 25 U.S.C. § 1915(c); BIA Guideline F.1(c), F.1 Commentary, F.3 Commentary, 44 Fed. Reg. at 67,594. A parent's selection of a particular adoptive parent cannot by itself override ICWA's placement preferences. *See In re T.S.W.*, 276 P.3d at 145, 148; *but see In re B.B.A.*, 224 P.3d 1285, 1288 (Okla. Civ. App.

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[10] States that enacted statutes explicitly rejecting the existing Indian family exception often specify that ICWA "appl[ies] to any Indian child custody proceeding regardless of whether the Indian child is in the legal custody or physical custody of an Indian parent, Indian custodian, extended family member, or other person." *See* Wis. Stat. Ann. § 938.028(3)(a); *accord* Okla. Stat. Ann. tit. 10 §§ 40.1, 40.3(B); Minn. Stat. Ann. § 260.771(2). By so doing, States made express their disagreement with those state courts that had adopted the flawed rationale underlying the exception.

2009) (suggesting that parental preference alone may be sufficient to support a "good cause" finding).

And States cannot provide "additional protections to some parties to a child custody proceeding [that would] deprive other parties of rights guaranteed to them by the Act." BIA Guidelines, Introduction, 44 Fed. Reg. at 67,585. In this case, as long as Father has acknowledged and established paternity in accordance with ICWA,[11] he has the right to ICWA's protections as a parent of an Indian child. *See, e.g.*, 25 U.S.C. §§ 1911(b) (giving either parent the option to petition for transfer or object to a transfer of state court proceedings to tribal court); 1912(a) (providing for specific notice to the child's parent and allowing the parent additional time to prepare for pending proceedings); 1912(b) (granting an indigent parent the right to court-appointed counsel if it is in the child's best interest); 1912(e) and (f) (requiring a finding that the child's continued custody by "the parent" is likely to result in serious emotional or physical damage to the child); 1913 (outlining special considerations for a parent's voluntary consent to a foster-care placement of or termination of parental rights to an Indian child); 1914 (allowing "any parent" to petition a court to invalidate proceedings upon a showing of a violation of certain provisions); 1916 (allowing "a biological parent" to petition for return of a child after an order granting adoption of that child by another has been vacated or set aside). The existing Indian family exception ignores these protections.

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[11] See Section II of this Argument *infra*.

Similarly, ICWA affords numerous rights to the child's tribe, and those rights cannot be abrogated by the actions of one or both of the child's parents. *See Holyfield*, 490 U.S. at 49-50 (delineating tribal rights under ICWA and holding that compliance with "ICWA's jurisdictional *and other provisions*" cannot be premised on "the wishes of individual parents," but rather must take into account "the interests . . . of the tribes themselves") (emphasis added).[12]

Allowing a parent—particularly a non-Indian parent with no ties to the tribe—to preclude the tribe from any involvement in the case simply by consenting to the child's adoption does not comport with the language or the purposes of ICWA. *See Child of Indian Heritage*, 543 A.2d at 932 (holding that "the application of the ICWA to voluntary private placement adoptions is not inconsistent with the purposes of the Act, particularly in cases in which an unwed father has not consented to the adoption"). The Act requires balancing the rights of the mother against those of the child, father, and the tribe:

> while an unwed mother might have a legitimate and genuine interest in placing her child for adoption outside of an Indian environment, if

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[12] A tribe's right to notice may be limited in a voluntary adoption proceeding where a parent requests anonymity. *See* 25 U.S.C. §§ 1912(a) (providing for notice in "any *involuntary* proceeding"), 1915(c) (allowing the court to consider a consenting parent's request for anonymity when making placement determinations); BIA Guideline F.1(c), F.1 Commentary, 44 Fed. Reg. at 67,594; *Matter of Baby Boy J.*, 944 N.Y.S.2d 871, 874-75 (N.Y. Surrog. 2012).

> she believes such a placement is in the child's best interests, consideration must also be given to the rights of the child's father and Congress' belief that, whenever possible, it is in an Indian child's best interests to maintain a relationship with his or her tribe.

Id., 543 A.2d at 932. "Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." *Holyfield*, 490 U.S. at 50.

C. The Existing Indian Family Exception Frustrates Congress's Purposes and Objectives for Enacting ICWA.

As a result of increased urban employment opportunities, concerted public and private efforts at assimilation, and generations of deliberate separation of families, many Indian individuals lost ties to their tribes and reservations, effectively preventing them from creating "Indian families" as understood by the courts that have adopted that doctrine. Because Congress intended to protect "the continued existence and integrity of Indian tribes" when it enacted ICWA, 25 U.S.C. § 1901, the existing Indian family exception is inconsistent with Congress's purposes and objectives.

In 1978, Congress enacted ICWA

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture. . . .

25 U.S.C. § 1902. Congress did so recognizing both "that an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies," and "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3), (4).

Congress also recognized that state courts were ill-suited to determine an Indian child's affiliations. *See* 25 U.S.C. § 1901(5) (noting that "the States . . . ha[d] often failed to recognize essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families"). The BIA Guidelines noted that ICWA "ma[de] clear that the best source of information on whether a particular child is Indian is the tribe itself." BIA Guideline B.1 Commentary, 44 Fed. Reg. at 67,586.

Consequently, allowing a state court to gauge whether a child's family "existed" as an "Indian family" before applying ICWA's protections ignores the reality of generations of cultural decimation that had ensured

that children would not or could not be part of an existing Indian family. California's second appellate district thought it "almost too obvious to require articulation that 'the unique values of Indian culture' (25 U.S.C. § 1902) will not be preserved in the homes of parents who have become fully assimilated into non-Indian culture." *Bridget R.*, 49 Cal.Rptr. 2d at 526. What the court failed to take into account, however, was that it was actions precisely like those of the parents in that case—deliberately placing Indian children for adoption outside of a culture that they had been taught was inferior—that led to the "assmiliat[ion] into non-Indian culture" and threatened the continued existence of that culture and the sovereign tribes to which it belonged.

Lastly, allowing a state court to gauge whether an Indian child comes from an existing Indian family essentially negates the tribes' interests in ensuring their own survival by looking to the preservation of their ties to future generations. It gives parents—who may wish to distance themselves from their tribes for a variety of reasons—the ability to preclude the tribes from protecting their rights to their most "vital" resource. 25 U.S.C. §1901(3).

II. Allowing Unwed Fathers of Indian Children to Timely Acknowledge or Establish Paternity by Means Other than Strict Compliance with State Paternity Laws Comports with ICWA's Purpose and Objectives and Supports the States' Goal of Efficient and Stable Adoptions of Indian Children.

Under ICWA, a "parent" is "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom." 25 U.S.C. § 1903(9). The definition explicitly excludes, however, "the unwed father where paternity has not been acknowledged or established." *Id.* The Act is silent regarding how an unwed father may "acknowledge[] or establish[]" paternity.

Petitioners and their amici argue that the only way to determine whether a father meets ICWA's definition of a "parent"—as limited by the second sentence of Section 1903(9)—is to look solely to state laws delineating which fathers have adoption consent rights. (*See, e.g.*, Petitioners' Brief at 20; Brief of Adoptive Parents Committee, Inc., at 6; Brief of Birth Mother at 11-12.) But when Congress intended "that ICWA terms be defined by reference to other than federal law, it stated this explicitly." *Holyfield*, 490 U.S. at 47 n.22 (citing references in § 1903(2) and (6) to tribal law or custom and to state law). Although an unwed father who has acknowledged or established paternity under state law has clearly satisfied the requirements to be considered a "parent" under ICWA, the South Carolina Supreme Court correctly determined that ICWA's definition of "parent" does not depend on state law.

Nothing in ICWA's plain language requires an unwed father to comply with State paternity-establishment requirements in order to acknowledge or establish paternity for purposes of ICWA. "Primary responsibility for interpreting . . . language used in the Act [that is not expressly delegated to the Secretary of the Interior to interpret] rests with the courts that decide Indian child custody cases." BIA Guidelines, Introduction, 44 Fed. Reg. at 67,584. This Court recognized that the purpose of ICWA "gives no reason to believe that Congress intended to rely on state law for the definition of a critical term." *Holyfield*, 490 U.S. at 44. In that case, the Court was not confronted with interpretation of § 1903(9), but instead with the term "domicile" as it relates to the fundamental jurisdictional provisions of ICWA. The definition of "parent" is no less significant, however, as it determines to whom ICWA's rights and responsibilities apply.

A. States Have Recognized the Acknowledgment or Establishment of Paternity for Purposes of ICWA by Means Other than Strict Compliance with State Statutes.

Considering the history and purpose of ICWA and the fundamental nature of the rights at stake, States have recognized that their statutory provisions for acknowledging or establishing paternity may not be the only ways that an unwed father may acknowledge or establish paternity sufficient to assert ICWA's protections and rights.

The Arizona Court of Appeals, for example, recognized that, because "ICWA does not . . . define how paternity can be acknowledged or otherwise detail any procedure to establish paternity," the court begins its analysis by "look[ing] to state law to determine whether paternity has been acknowledged or established." *Jared P. v. Glade T.*, 209 P.3d 157, 161 (Ariz. App. 2009). Although the father in that case had not adequately acknowledged or established paternity under methods recognized by Arizona law, the court continued its analysis and "recognized that a parent can 'acknowledge' paternity under ICWA by admission and genetic testing" even though he failed to file a formal paternity action. *Id.* (citing *Michael J. Jr.*, 7 P.3d at 961). The actions of the father in that case—challenging "the adoption agency's petition seeking to terminate his parental rights before the child was born," attempting to be present at the child's birth, filing a paternity action in Texas, writing a letter to the juvenile court, enrolling himself in the Cherokee Nation, submitting proof of his membership to the court, and complying with a court-ordered DNA test—were sufficient to constitute an acknowledgement or establishment of paternity under ICWA despite his failure to strictly comply with Arizona's paternity procedures. *Id.* at 162.

Other States have reached similar conclusions. *See Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) ("to qualify as an ICWA parent an unwed father does not need to comply perfectly with state laws for establishing paternity, so long as he has made reasonable efforts to acknowledge paternity"); *Baby Boy Doe*, 849 P.2d at 932 (holding that the trial court had sufficient evidence to support a finding of a father's

paternity based on the father's application for the child's enrollment in the tribe and affidavit of paternity filed with the tribe as well as an affidavit filed by the father's sister that she had filed a state paternity affidavit on his behalf).[13]

However, failing to take adequate steps to assert parental rights is sufficient to defeat an unwed father's claim of parenthood under ICWA. *See Matter of Adoption of T.R.M.*, 525 N.E.2d 298, 313-14 (Ind. 1988) (noting that a father's failure to take any steps beyond writing a letter to the court objecting to his putative child's adoption and requesting counsel was insufficient to determine that he had acknowledged or established paternity).

In addition to the quality of steps taken, a father's timing in asserting his paternity is a factor that this Court and the States must consider. In *Lehr v. Robertson*, for example, the biological father took concrete steps to assert his paternity, but not until his child was two years old. *Lehr*, 463 U.S. 248, 262 (1983). A father must "[take] steps to acknowledge paternity" upon learning of his possible parenthood. *In re Baby Girl B.*, 67 P.3d 359, 366 (Okla. Civ. App.

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[13] *But see Baby Boy D.*, 742 P.2d at 1064 (defining acknowledging or establishing paternity as "acknowledged or established through the procedures available through the tribal courts, consistent with tribal customs, or through procedures established by state law"); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 172-73 (Tex. App. 1995) ("Congress intended to have the issue of acknowledgement or establishment of paternity determined by state law"); *Child of Indian Heritage*, 543 A.2d at 935 (Congress intended to defer to state or tribal standards for establishing paternity).

2003). However, the Texas appellate court rejected a tribe's contention that because ICWA uses the past tense in its requirement that a father has "acknowledged or established" his paternity, the father must have done so prior to the initiation of an adoption proceeding. *Yavapai-Apache Tribe*, 906 S.W.2d at 173-74. The court held:

> The ICWA does not set forth any time limits in which an unwed father must establish or acknowledge his paternity. . . . To hold that an unwed father must act before [court adoption or termination proceedings are initiated] or forever be prohibited from attaining parental status would dissuade such actions by biological fathers. This could not be what Congress envisioned. . . . In view of the events that were occurring at the time the ICWA was passed, and the reference to *Stanley* [*v. Illinois*, 405 U.S. 645] in the House Report [H.R. Rep. No. 95-1386 (1978), 1978 U.S.C.C.A.N. 7530], we do not accept that Congress intended to exclude unwed fathers from the definition of "parent" from the moment any action is taken by an Indian tribe concerning child custody if the fathers have not yet formally established or acknowledged their paternity. The construction of section 1903(9) suggested by [the tribe] would tend to further erode the family unit at a time when this country and Indian tribes are involved in a struggle to maintain the integrity of the family.

Id. But States have recognized the importance of taking timely assertive steps, given the rights and needs of the Indian child involved. *See Maricopa Cnty.*

Juv. Action No. A-25525, 136 Ariz. 528, 667 P.2d 228 (Ariz. App. 1983) (holding that a father's failure to acknowledge paternity until thirty-one months after the initiation of an adoption action and three years after the child's birth was inadequate).

Some States have required that an unwed father acknowledge or establish paternity before the entry of an adoption order or the termination of his parental rights. *See Child of Indian Heritage*, 543 A.2d at 933; *Quinn I*, 845 P.2d at 208. Taking some action to establish or acknowledge paternity prior to the entry of a final order of adoption recognizes the "turning point in the status of the natural and adoptive parents" prior to which "there can be no expectation on the part of the adopting parents that the legally tentative decision to place the child for adoption will not be revoked." *Child of Indian Heritage*, 543 A.2d at 939; *see also* 25 U.S.C. § 1913(c) (allowing a parent to withdraw a voluntary consent to adoption at any time prior to a final decree of adoption). Clearly some unwed fathers may lack the ability to take action prior to the entry of a termination or adoption order, often because they lacked notice of the mother's pregnancy or the pending adoption, or had otherwise been precluded from taking action. In such cases, the father should act as soon as practicable after discovering "that the mother no longer had custody of their child and that the child had been placed for adoption." *Child of Indian Heritage*, 543 A.2d at 936. Ultimately the determination of whether a father has taken timely or adequate steps to acknowledge or establish paternity is a fact-specific one best left to the state courts.

In this case, the South Carolina Supreme Court correctly concluded that Father "met the ICWA's definition of 'parent' by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establishing his paternity through DNA testing." *Adoptive Couple*, 731 S.E.2d at 560.

B. The States' Interest in Secure and Stable Adoptions Is Furthered by Recognizing that Fathers Can Acknowledge or Establish Paternity for Purposes of ICWA Even Absent Strict Compliance with Varied State Laws for Establishing Paternity.

Although States have an interest in ensuring the security and stability of adoptions of children born in a state or being effectuated in a state, Congress clearly shared that interest. *See Holyfield*, 490 U.S. at 46 (noting that "a statute under which different rules apply from time to time to the same child, simply as a result of her transport from one State to another, cannot be what Congress had in mind"). Applying different state paternity laws to proceedings that are governed by ICWA—depending on where the father, mother, child, and adoptive parent reside—could result in confusion or "an adoption brokerage business" as contemplated in *Holyfield*, 490 U.S. at 45-46 n.20. Similarly, such a reading of ICWA does nothing to further States' interests in ensuring that their children's and adoptive parents' rights are protected regardless of where a child is born, where the father resides, or where the adoption ultimately takes place.

This Court has recognized that matters of family relationships are traditionally left to the States to define and determine. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). Nevertheless, the Federal government has conditioned States' receipt of funds on the enactment of State laws to, *inter alia*, establish "[e]xpedited administrative and judicial procedures . . . for establishing paternity." 42 U.S.C. § 666(a)(2). To that end, States have developed means by which an unwed father may assert parental rights to his biological children. Fathers may voluntarily acknowledge their paternity or establish a presumption of paternity by, for example, supporting the child, marrying the child's mother, or undergoing a DNA test resulting in confirmation of biological paternity.[14] *See* Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 Brandeis L.J. 59 (2006) (discussing various State methods for paternity establishment). In addition to formal court processes, an illegitimate child's father may secure parental rights if he openly acknowledges the child; exercises custody; and provides supervision, support, and care for the child, *see, e.g., State ex rel. T.A.B. v. Corrigan*, 600 S.W.2d 87, 91-92 (Mo. App. 1980), or "seasonably demonstrate[s] a meaningful intent and a continuing capacity to assume responsibility with respect to the supervision,

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[14] Although mere biology may not be enough to acknowledge or establish paternity under ICWA, the Act clearly contemplates its importance. Indian children often obtain their status through their biological connection to a member of an Indian tribe, 25 U.S.C. § 1903(4), evincing Congress's recognition of the importance of that biological connection. *See also In re E.G.*, 88 Cal.Rptr. 3d 871, 872-73 (Cal. App. 2009).

protection and care of the child," *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 408-09 (Mo. 1978).

Most States have established putative father registries, through which an unwed father can claim his offspring prior to or shortly after the child's birth by filing a written notice with the State.[15] In most cases, by filing a notice with the registry, the father establishes his claim and is thereby entitled to notice of any adoption proceeding regarding his child. Similarly, fathers may file voluntary acknowledgements of paternity to secure their parental rights.[16]

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[15] *See* Ala. Code § 26-10C-1; Ariz. Rev. Stat. Ann. § 8-106.01; Ark. Code Ann. § 20-18-702; Colo. Rev. Stat. § 19-5-105; Conn. Gen. Stat. Ann. § 46b-172a; Fla. Stat. Ann. § 63.054; Ga. Code Ann. § 19-11-9; Haw. Rev. Stat. Ann. § 578-2(d)(5); Idaho Code Ann. § 16-1513; 750 Ill. Comp. Stat. Ann. 50/12.1; Ind. Code Ann. § 31-19-5-1 to -25; Iowa Code Ann. § 144.12A; La. Rev. Stat. Ann. § 9:400; Mass. Gen. Laws Ann. ch. 210, § 4A; Mich. Comp. Laws Ann. § 710.33; Minn. Stat. Ann. § 259.52; Mo. Ann. Stat. § 192.016; Mont. Code Ann. § 42-2-202; Neb. Rev. Stat. Ann. § 43-104.01; N.H. Rev. Stat. Ann. § 170-B:6(I)(b); N.M. Stat. § 32A-5-20; N.Y. Soc. Serv. Law § 372-c; Ohio Rev. Code Ann. § 3107.062; Okla. Stat. Ann. tit. 10 § 7506-1.1; Or. Rev. Stat. § 109.096; 23 Pa. Cons. Stat. Ann. § 5103; Tenn. Code Ann. § 36-2-318; Tex. Fam. Code Ann. § 160.401; Utah Code Ann. § 78B-15-402; Vt. Stat. Ann. tit. 15A, § 1-110; Wis. Stat. Ann. § 48.025; Wyo. Stat. Ann. § 1-22-117.

[16] *See, e.g.*, Ala. Code § 26-11-2; Ariz. Rev. Stat. Ann. § 25-812; Ark. Code Ann. § 20-18-408; Idaho Code Ann. § 7-1106; Ind. Code Ann. § 16-37-2-2.1(b)(1)(B); 750 Ill. Comp. Stat. Ann. 45/5(a)(3); Md. Code Ann., Fam. Law § 5-1028(v)-(vii); Miss. Code Ann. § 93-9-28; Tex. Fam. Code Ann. § 160.301.

The State's ultimate goal is served when unwed fathers of Indian children are able to acknowledge or establish paternity by taking affirmative steps which may or may not exactly meet state-law requirements for acknowledging or establishing paternity. This facilitates the permanency and stability of Indian children's adoptions by requiring immediate ICWA compliance to prevent placement-disrupting litigation. A father who asserts his rights in a timely, meaningful way secures the status of a "parent" under ICWA. This does not mean that such a father is entitled to immediate custody or that the child's adoption by the proposed adoptive parent is foreclosed.[17] It simply means that the father is entitled to notice of the proceedings (25 U.S.C. § 1912(a)) and a hearing to determine whether his custody of the child is likely to result in serious emotional or physical damage to the child (§ 1912(e), (f)) and whether the continued placement with the adoptive parent meets ICWA's placement preferences or there is good cause to deviate from them (§ 1915).[18] When a capable father takes

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[17] Petitioners and their amici cite scenarios where fathers fail to assume any paternal responsibility or mistreat the mothers of Indian children. (*See, e.g.*, Petitioners' Brief at 25-27; Brief of American Academy of Adoption Attorneys at 19-24). But in those cases, it is likely that the child's adoption will proceed as anticipated by the mother who consents. In such cases, fathers will continue to fail to avail themselves of means of acknowledging or establishing paternity—rendering them unable to claim the status of "parent" under either ICWA or state law—or the courts will deny them custody of their children and terminate their rights based on their inability to safely parent the child.

[18] Just as the actions of a custodial non-Indian mother cannot unilaterally abrogate the Indian child's tribe's right to notice, an

concrete steps to gain custody of a wanted child, his interests will not be foreclosed merely because he has not successfully complied with the requirements for establishing paternity in a state with which he may have no contacts other than his child's presence there.

Indian child's father's action or inaction with respect to the establishment or acknowledgment of paternity does not affect the tribe's rights regarding the Indian child and the application of ICWA.

CONCLUSION

For the foregoing reasons, this Court should affirm the holding of the South Carolina Supreme Court in favor of Respondents Birth Father and the Cherokee Nation.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-399

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Supreme Court of the United States

ADOPTIVE COUPLE,
Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF FOR *AMICI CURIAE* ASSOCIATION ON AMERICAN INDIAN AFFAIRS, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, INDIAN TRIBES, AND OTHER INDIAN ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INDIAN ORGANIZATIONS

Alliance of Colonial Era Tribes, Inter-Tribal Council of Nevada, Morningstar Institute, National American Indian Court Judges Association, and the Tribal Law and Policy Institute.

QUESTIONS PRESENTED

1. Whether Congress intended a uniform federal law definition of the term "parent" in the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-1963, based upon the common meaning of the terms "acknowledged" and "established" set forth in that definition, so that the rights of unwed fathers of Indian children would not vary from State to State.

2. Whether ICWA should be applied, as written, to cover all "Indian children" involved in any state "child custody proceeding," or modified by a judicially-created "existing Indian family exception" which would exclude large numbers of Indian children, parents, extended families and Tribes from the Act's coverage.

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INTERESTS OF *AMICI CURIAE*

Amici Curiae are leading national Indian organizations and individual Tribes from throughout Indian country.[1]

The Association on American Indian Affairs ("AAIA") is a 90 year old Indian advocacy organization which began its active involvement in Indian child welfare issues in 1967. The National Congress of American Indians ("NCAI") is the largest national organization addressing Indian interests, representing more than 250 American Indian Tribes and Alaskan Native villages since 1944. The National Indian Child Welfare Association ("NICWA") is a non-profit membership organization established in 1987, which serves as a national voice for Indian children and families, including promoting compliance with the Indian Child Welfare Act ("ICWA"). The Alliance of Colonial Era Tribes, Inter-Tribal Council of Nevada, Morningstar Institute, National American Indian Court Judges Association, and Tribal Law and Policy Institute are all non-profit organizations that advocate for laws and policy that, like ICWA, support the sovereignty of Indian Tribes.

The Confederated Salish & Kootenai Tribes, Confederated Tribes of Grand Ronde, Confederated Tribes of Siletz Indians of Oregon, Confederation of Sovereign Nanticoke-Lenape Tribes, Haliwa-Saponi

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[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

Indian Tribe, Kootenai Tribe of Idaho, Little River Band of Ottawa Indians, Little Traverse Band of Odawa Indians, Lummi Nation, Mississippi Band of Choctaw Indians, Nez Perce Tribe, Omaha Tribe of Nebraska, Ponca Tribe of Nebraska, Port Gamble S'Klallam Tribe, Prairie Band Potawatomi Nation, Pueblo of Laguna, Pueblo of Tesuque, Samish Indian Tribe, Santee Sioux Tribe of Nebraska, Sauk-Suiattle Tribe, Shoshone-Bannock Tribes, Sisseton Wahpeton Oyate, Spokane Tribe, The Tulalip Tribes, Upper Skagit Indian Tribe, Ute Mountain Ute Tribe, Wampanoag Tribe of Gay Head (Aquinnah), Winnebago Tribe of Nebraska, Yankton Sioux Tribe, and Yocha Dehe Wintun Nation are sovereign Indian Tribes who are vitally interested in ensuring that the ICWA is interpreted to fully protect the best interests of Indian children, families and Tribes.

SUMMARY OF ARGUMENT

The Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, was enacted in 1978 in response to a crisis affecting Indian children, families and Tribes. Studies revealed that large numbers of Indian children were being separated from their parents, extended families, and communities and placed in non-Indian homes. This was occurring both through involuntary removals of Indian children by state agencies and because of sometimes abusive practices in the voluntary adoption system. Congressional testimony documented the devastating impact this was having upon Indian children, families and Tribes. As a result, Congress enacted mandatory legal requirements to be followed by state courts who are adjudicating the rights of Indian

children and their families whose residence and domicile is outside of an Indian reservation, as defined in ICWA.

The main goals of ICWA are to:

(1) "curtail State authority" over child custody proceedings involving Indian children primarily by providing for uniform minimum federal standards that must be applied in state courts,

(2) protect the rights of biological parents and extended families as a response to the egregious violations of parental and extended family rights that had been taking place in state courts. Congress believed that protecting the relationship between children and their parents and extended families (as well as with the tribal community) was in the best interests of Indian children, and

(3) recognize the vital role of Tribes in protecting their children through the confirmation of their exclusive jurisdiction over children resident or domiciled on the reservation, as well as their right to intervene in (and in appropriate cases, seek transfer of) state child custody proceedings in order to effectuate their *parens patriae* interest in Indian children, as defined by the Act.

The provisions in ICWA were designed to address the abuses that were identified, reduce the number of out-of-home placements of Indian children, and provide protections to Indian families and children in both involuntary and voluntary proceedings.

This Court is being urged to interpret ICWA to incorporate state law definitions into the meaning of

"parent" under the Act and to adopt the so-called "existing Indian family exception" (EIF) as an appropriate interpretation of Congress' intent in enacting the ICWA. If adopted, the petitioners' legal theories would have a profound effect upon the operation of ICWA in both involuntary and voluntary settings undermining some of ICWA's key provisions and thwarting Congress' goals.

Applying state law to determine who is a parent under ICWA would undermine the intent of ICWA to curtail state authority and Congress' intent that the law be uniformly applied. The application of this theory would create a statutory scheme where a parent's rights under ICWA would vary from state to state. This would not only encourage forum shopping for adoption, but would force some unwed fathers to comply with standards in a state potentially thousands of miles from their actual residence– standards that might be dramatically different from the standards of their Tribe or the State in which they reside. These outcomes compromise Congressional goals of protecting parental rights and natural family-child relationships, and decreasing the number of Indian children adopted in non-tribal homes. For these reasons, the interpretation of "acknowledgment" and "establishment" in ICWA's definition of "parent" should, as a matter of federal law, be given their plain meanings.

The EIF is contrary to the legislative history and the language of the statute which applies when an Indian child is involved in a child custody proceeding, as both terms are defined by the Act. Petitioners have tried to create a uniform theory

about the meaning of "custody" in ICWA to argue that if a child has never been in the custody of an Indian parent none of the provisions of the Act apply. This is contrary to the intent of Congress. In fact, Congress did not adopt a proposed amendment that would have achieved exactly what petitioners are seeking. Moreover, petitioners' theory would create a gaping hole in the coverage of ICWA that would exclude large numbers of Indian children, parents and their extended families and Tribes from the protection of the Act in both voluntary and involuntary proceedings. It would also make meaningless for many parents and their children the provisions in ICWA that apply to voluntary consents. This would be an absurd result not supported by the statutory language when read in its entirety, nor is there any evidence in the legislative history that Congress intended to carve out such an exception. The EIF has been rejected by the vast majority of states considering the issue.

Amici respectfully urge this Court to confirm a uniform federal definition of parent based upon the plain meaning of the terms in the statute, apply the statute as written, and reject the EIF.

ARGUMENT

I. Congress held hearings in the 1970s in regard to a crisis in state child welfare and adoption systems—a crisis that resulted in large numbers of Indian children being separated from their parents, Tribes and extended families and placed with non-Indians.

Congress initiated its first hearing on the state of American Indian and Alaska Native (hereinafter "Indian") children in out-of-home placements in 1974. During testimony before the Senate subcommittee, William Byler, Executive Director of *amicus* Association on American Indian Affairs ("AAIA"), commented on the statistical evidence uncovered by AAIA, stating that the high rate of outplacement for Indian children was "the most tragic aspect of Indian life today." *Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs, S. Comm. on Interior and Insular Affairs*, 93rd Cong. 3 (1974) (statement of William Byler) (hereinafter "1974 Senate Hearing").

Studies by AAIA documented that Indian children were placed in foster care far more frequently than non-Indian children. Indian placement rates by state ranged from 2.4 to 22.4 times the non-Indian rate with the percentage of Indian children placed in non-Indian foster homes ranging from 53% to 97%. *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Committee on Indian Affairs*, 95th Cong.

539 (hereinafter "1977 Senate Hearing")

Nationwide, "[t]he adoption rate of . . . Indian . . . children was eight times that of non-Indian children [and] [a]pproximately 90% of the . . . Indian placements were in non-Indian homes." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1988). In the most extreme case, the Indian adoption rate was 18.8 times the non-Indian rate. 1977 Senate Hearing at 539. The percentage of American Indian and Alaska Native children placed in non-Indian adoptive homes ranged from 69% in Washington to 97% in Minnesota. *Id.* at 537-603. Overall, the evidence revealed that "25-35% of . . . Indian . . . children had been separated from their families and placed in foster homes, adoptive homes or institutions." *Holyfield*, 490 U.S. at 32.

Although progress has been made as a result of ICWA, recent analyses of national child welfare data indicate that the out-of-home placement of Indian children is still disproportionate to the percentage of Indian youth in the general population and that Indian children continue to be regularly placed in non-Indian homes, an indication of the continuing need for Congressional intervention in this area. *See, e.g.*, Alicia Summers, Steve Woods, & Jesse Russell, National Council of Juvenile and Family Court Judges, *Technical Assistance Bulletin: Disproportionality Rates for Children of Color in Foster Care* 7 (2012) (finding that although Native children make up 0.9% of the United States population they make up 1.9% of children in foster care); Rose M. Kreider, *Interracial Adoptive Families and Their Children: 2008, in* National Council for

Adoption Factbook V 109 (2011) (reporting that in 2008 more Indian children in adoptive placements lived in non-Indian adoptive homes than Indian adoptive homes).

A. Congress found that this extraordinary and unwarranted rate of placement in out-of-home non-Indian households was not in the best interests of Indian children, families, and Tribes.

Congress was concerned about "the placement of Indian children in non-Indian homes . . . based in part on evidence of the detrimental impact on the children themselves of such placement outside their culture." *Holyfield*, 490 U.S. at 49-50. Testimony at Congressional hearings was replete with examples of Indian children placed in non-Indian homes and later suffering from identity crises when they reached adolescence and adulthood. *See, e.g.*, 1974 Senate Hearing at 114. This phenomenon occurred even when the children had few memories of living as part of an Indian community. Such testimony led Congress to conclude that "[r]emoval of Indians from Indian society has serious long-and short-term effects . . . for the individual child . . . who may suffer untold social and psychological consequences." S. Rep. No. 95-597, at 43 (1977) (hereinafter "Senate Report 95-597").

In addition, Congress heard considerable testimony on the importance of the extended family in Indian cultures. As the House Committee Report explained:

> [T]he dynamics of Indian extended families are largely misunderstood. An

> Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family . . . The concept of the extended family maintains its vitality and strength in the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in childbearing.

H.R. Rep. No. 95-1386, at 10, 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530 (hereinafter "House Report 95-1386"). In some Indian cultures, all relatives have the label of parent and the same responsibility for the child. *See Holyfield*, 490 U.S. at 35, n. 4. As Mel Tonasket of the Colville Tribe, President of *amicus* National Congress of American Indians ("NCAI"), explained, "There is no such thing on my reservation as an abandoned child because even if you are a one-eighth cousin, if that child is left alone, that's like your brother or sister, or your son or daughter. It's been that way since our old people can remember." 1974 Senate Hearing at 225. *See also Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 110 (1978) (hereinafter "1978 House Hearings"), *viz.*, ("there are no words in the Indian country, the Indian language, their hearts and minds, for an illegitimate child . . . We have no word or definition for an orphan . . . because of the extended family.") (testimony by Elizabeth Cagey of the Tacoma Indian Center); *Id.* at 256 (testimony of Governor Lewis of the Zuni Pueblo, President of the National

Tribal Chairman's Association). As Senator Abourezk summarized at the end of the 1974 Senate Hearing:

> We've had testimony here that in Indian communities throughout the Nation there is no such thing as an abandoned child because when a child does have a need for parents for one reason or another, a relative or friend will take that child in. It's the extended family concept.

1974 Senate Hearing at 473.

Thus, Congress clearly intended to acknowledge and protect a different family structure than that protected under state laws as it understood that placement of a child outside the family is a loss felt by the entire extended family and kinship network. As stated by Dr. Marlene Echohawk, on behalf of *amicus* NCAI, the thrust of ICWA "is to support the general proposition that it is in the best interests of [Indian] children to be raised by their natural family and that every opportunity should be provided to maintain the integrity of the natural family." 1977 Senate Hearing at 142. *See also* House Report 95-1386 at 19-20 (underlying principle of ICWA is the best interests of the Indian child which Congress has defined in ICWA because the legal principle itself as applied in state systems is vague and can rest on "subjective values.")

In the case of Indian Tribes, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ." 25 U.S.C. § 1901(3). Congress

heard testimony directly from tribal leaders recounting the harm being suffered by the Tribes:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

1978 House Hearings at 1[illegible] (statement of Calvin Isaac, National Indian Tribal Chairman's Association).

This concern was also reflected in statements by the principal sponsor in the House, Rep. Morris Udall, who stated that "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy" 124 Cong. Rec. 38102 (1978) quoted in *Holyfield*, 490 U.S. at 34, n.3 and the minority floor manager, Rep. Robert Lagomarsino, who said that "for tribes in particular, the continued wholesale removal of their children by nontribal government and private agencies constitutes a serious threat to their existence as on-going self-governing communities." 124 Cong. Rec. 38103 (1978).

B. Congress determined that a large part of the cause for this crisis was certain abusive practices taking place in state child welfare systems.

Congress found that "the States, exercising their recognized jurisdiction over American Indian and Alaska Native child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of American Indian and Alaska Native people and the cultural and social standards prevailing in American Indian and Alaska Native communities and families." 25 U.S.C. § 1901(5). The House Committee described "'the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of the Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.'" House Report 95-1386 at 19, *cited in Holyfield,* 490 U.S. at 45, n. 18; *see also id.* ("'state courts and agencies and their procedures share a large part of the responsibility' for crisis threatening 'the future and integrity of Indian tribes and Indian families.'") (statement by Rep. Morris Udall)

There was considerable testimony about the abuses taking place in state child welfare systems. One of the most frequent complaints was the tendency of social workers to apply standards that ignored the realities of Indian societies and cultures. For example, children were often removed or threatened with removal because they were placed in the care of relatives or their homes lacked the amenities that could be found in non-Indian society. *See, e.g.*, 1977

Senate Hearings at 77-78, 166, 316; 1978 House Hearings at 115.

State child welfare systems operated in virtually an unfettered fashion, largely unchecked by judicial due process. In addition, "[g]enerally there . . . [were] no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agents." 124 Cong. Rec. H12849 (1978) (statement of Rep. Robert Lagomarsino). The result of this systemic failure was summarized as follows:

> (1) . . . many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.
>
> (2) The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law . . . Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children. Because of the availability of waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of

welfare departments.

(3) . . . agencies established to place children have an incentive to find children to place.

House Report 95-1386 at 10-12.

C. Congress also determined that the high rate of adoptions of Indian children was due in part to certain abusive practices in the private adoption system.

Although concerns about involuntary removals by state agencies were a major impetus for ICWA, it is clear that "voluntary" adoptions of Indian children were likewise of great concern to Congress based upon the evidence it considered. As Senator Abourezk observed, "[p]artly because of the decreasing numbers of Anglo children available for adoption and changing attitudes about interracial adoptions, the demand for Indian children has increased dramatically." 123 Cong. Rec. 21043 (1977). *See also* 1974 Senate Hearing at 146 ("[Indian] Infants under 1 year old are adopted at [a] rate . . . 139 percent greater than the rate of non-Indians in the state of Minnesota.")

Senator Abourezk's statement was an accurate reflection of the hearings which were replete with testimony about public and private agencies and private attorneys and their sometimes overzealous pursuit of Indian children for adoption by non-Indians. *See, e.g.*, 1974 Senate Hearing at 70 (referring to the adoption system as a "grey market" because "there's tremendous pressure to adopt Indian children, or have Indian children adopted out") (testimony of Bertram

Hirsch for *amicus* AAIA), *id.* at 161 (calling for "an investigation of agencies who deal with the Indian adoptions and make them accountable for the methods they use for transporting Indian children across the state lines and the Canadian borders") (testimony of Esther Mays, Native American Child Protection Council); 1977 Senate Hearing at 359, *viz.*,

> Private adoption . . . process involves doctors and private attorneys who arrange for adoptions of their Indian client's children to a non-Indian through their attorney directly through a court . . . All of us are aware of the adoption black market that has blossomed due to the effects of modern family planning efforts. Some people will pay thousands of dollars for a child. It is also well-known that Indian children have always been a prize catch in the field of adoption.

(statement of Don Milligan, State of Washington, Department of Social and Health Services)

Particular concerns were expressed about the failure of adoption agencies to utilize Indian families for placement. *See, e.g.*, 1974 Senate Hearing at 61 ("[W]elfare agencies tend to think of adoption too quickly without having other options available . . . Once you're at the point of thinking about adoption . . . welfare agencies are not making adequate use of the Indian communities themselves. They tend to look elsewhere for adoption type of homes.") (testimony of Dr. Carl Mindell, a child psychiatrist at Albany Medical College); *id.* at 116 ("The standards that have

been established by adoption agencies have created an additional burden . . . as they are white status quo oriented . . . As you well know, this automatically leaves the Indian out.") (statement of Mel Sampson, Northwest Affiliated Tribes); 1977 Senate Hearing at 271 ("Through various ways, the State of Washington public assistance and private placing agencies can completely go around the issue and place without contact to that child's tribe, until the action is completed and irreversible", noting that of 136 Colville adoptions in the last 10 years, only 20 went to Indian families and 31 were out-of-state.) (testimony of Virgil Gunn, Colville Business Council); 1974 Senate Hearing at 147 (testimony of Leon Cook).

Moreover, many "voluntary" consents are not truly voluntary. House Report 95-1386 at 11. Consents in voluntary adoption cases were sometimes "coerced" or induced by "trickery." *See, e.g.*, 1974 Senate Hearing at 23 and 222-23 (testimony about woman who was tricked into signing a form which she was told would allow two non-Indian women to take her child for a short visit, but which in reality was a consent to adoption, and a discussion of parents who have been "induced to waive their parental rights voluntarily without understanding the implications.") As Senator Abourezk summarized, it was asserted that "in many cases they [parents] were lied to, they were given documents to sign and they were deceived about the contents of the documents." 1974 Senate Hearing at 463.

Many of these practices continue today. State voluntary private adoption systems have been described as "inadequate" and "largely under-

regulated." *Id.* at 64, 66. Moreover, as white infants are in short supply, Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* 173 (2006), there is an increased demand for Indian, Asian American, or Latina babies. Pamela Anne Quiroz, *Adoption in a Color Blind Society* 5-6 (2007) (labeling this category of adoptable babies "honorary white babies.")

Thus, a recent report found that

> 1) Available data and experience indicate a minority of infant adoptions involve fathers in the process . . . Many states have established putative father registries . . . but they are often used as a means of cutting them out rather than including them;
>
> 2) In some states, attorneys paid by and representing the prospective adoptive parents also may represent the women (and men when they are involved) considering placing their children. This practice . . . raises acute ethical and practical concerns;
>
> 3) Most states do not have laws that maximize sound decision-making . . . such as required counseling, waiting periods of at least several days after childbirth before signing relinquishments, and adequate revocation periods during which birthparents can change their minds.

Evan B. Donaldson Adoption Institute, *Safeguarding*

the Rights and Well-Being of the Birth Parents in the Adoption Process 3-4 (2006).

It is not surprising that there are numerous examples of individuals seeking to effectuate an adoption who have engaged in unethical behavior, including trying to circumvent ICWA. *See, e.g., In Re Bridget R.*, 49 Cal. Rptr. 2d 507, 517 (Cal. Ct. App. 1996) (father omitted information that he was Native American on adoption form because "the adoption would be delayed or prevented if [Father's] Indian ancestry were known"); *In the Matter of the Adoption of Infant Boy Crews*, 803 P.2d 24, 26 (Wash. Ct. App. 1991) ([Adoption counselor] advised Crews not to mention her Indian blood to anyone, stating, "What I don't hear, I don't know."); *In re Adoption of Kenton H.*, 725 N.W.2d 548 (Neb. 2007) (Mother who "was hospitalized and 'under the influence of morphine and other mind-altering medications' when she signed the relinquishment . . . " was told by a caseworker "that her only hope of keeping any of her children was to voluntarily relinquish her rights to [the one child]").

As described in section III. B., *infra*, a number of the irregularities described above took place in the attempted adoption that is the subject of this case.

II. Congress responded to this crisis by enacting the Indian Child Welfare Act to establish minimum federal standards for the separation of Indian children from their families and to provide specific protections to Indian families and Tribes.

A. The primary mechanism utilized by Congress was to "curtail state authority."

Through ICWA, Congress established minimum federal standards" to be applied in *state* child custody proceedings. 25 U.S.C. § 1902. Other than the jurisdictional sections, 25 U.S.C. §§ 1911(a), 1911(b), and the full faith and credit requirement, 25 U.S.C. § 1911(c), ICWA's provisions do not apply to tribal court proceedings. ICWA's primary purpose is to protect Indian children and families that are not resident or domiciled on the reservation and are under state jurisdiction. The Act requires state courts to utilize federal standards to determine almost all of key issues that must be decided in child custody proceedings–when a child can be removed or parental rights terminated, what constitutes consent to adoption, and placement of the child in both adoption and foster care proceedings *See* 25 U.S.C. § 1912 (d)-(f), §1913, §1915(a),(b). Thus, as this Court has noted, the primary mechanism utilized by Congress to address this crisis was to "curtail state authority". *Holyfield*, 490 U.S. at 45, n. 17.

B. Congress established rules protecting the rights of Indian children, their biological parents and extended families.

In enacting ICWA, Congress placed an emphasis on protecting the rights of biological parents and extended families by "promot[ing] the stability and security of Indian . . . families." 25 U.S.C. § 1902. Thus, ICWA includes a number of provisions designed to keep families together. For example, Congress:

(1) established stringent substantive standards for involuntary foster care placement of an Indian child or termination of the parental rights of a parent of an Indian child, 25 U.S.C. § 1912(e), (f), including a requirement that the need for termination be shown "beyond a reasonable doubt," the most stringent standard possible; and

(2) required active efforts to provide remedial and rehabilitative services before Indian children may be removed from the care of their parents (except in emergency situations), 25 U.S.C. §§ 1912(d) and 1922.

Indeed, Congress believed that protecting parental rights was so important that in 25 U.S.C. § 1921 it provided that where state law provides greater protections *to the parents*, then state law should apply.

Where Indian children cannot stay with their biological parents, Congress expressed a clear preference that the child be placed with extended family or other tribal families. ICWA requires (absent a different tribal standard) that all adoptive placements of Indian children under state law be made preferentially with the child's extended family, other members of the Indian child's Tribe or other Indian families, in that order, absent good cause, 25 U.S.C. § 1915(a), a provision deemed as the "most important substantive requirement imposed on state courts". *Holyfield*, 490 U.S. at 37.

In addition to the placement requirements, ICWA provides a number of other protections specifically in the context of voluntary adoptions. Thus, the ICWA prohibits relinquishment of an Indian child for adoption for at least ten days after birth. 25 U.S.C. § 1913(a). Moreover, such consents must be executed before a court of competent jurisdiction and the Court must determine that the consequences of the consent "were fully understood by the parent or Indian custodian . . ." *Id.* Perhaps most significantly, 25 U.S.C. § 1913(c) allows for a consent to adoption to be withdrawn for any reason prior to the entry of a final decree of termination or adoption—a right much more "parent-protective" than most state statutes.

As discussed in part I.A., *supra*, this Congressional emphasis on parents' rights is in accord with the best interests of the child, not in conflict with it. The collective intent of these sections was to ensure "that Indian child welfare determinations [including adoptive placements] are not based on 'a white, middle-class standard, which, in

many cases, forecloses placement with (an) Indian family.'" *Holyfield*, 490 U.S. at 37.

C. Congress strengthened the role of Tribal governments as *parens patriae* for Indian children.

Congress also intended to strengthen the role of tribal governments "in furtherance of its special relationship with Indian tribes". 25 U.S.C. § 1901. In part, the ICWA is based upon the concept that an Indian tribal government stands in the relationship of *parens patriae* to its children. *See* Senate Report 95-597 at 51. It is well-settled that *parens patriae* authority extends beyond territorial boundaries. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982) (Puerto Rico, as *parens patriae*, has right to intervene in Virginia state court to protect the health and safety of Puerto Rican workers in Virginia.); *see also State of Alaska v. Native Village of Curyung*, 151 P.3d 388, 402 (Alaska 2006) (Tribe has right as *parens patriae* to bring suit to prevent future violations of ICWA). The *parens patriae* function is a core function of any sovereign government. In addition, tribal rights are recognized in ICWA because the law "'is based upon the fundamental assumption that it is in the child's best interest that its relationship to the tribe be protected . . . '" *Holyfield*, 490 U.S. at 37. Indeed, because of the importance of this relationship, "Congress determined to subject [voluntary] placements to the ICWA's jurisdiction and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents." *Id.* at 50.

For these reasons, ICWA emphasizes tribal involvement in and, whenever possible, control over decisions involving the welfare of Indian children (as defined in the Act) in order to "promote the stability and security of Indian tribes . . . ." 25 U.S.C. § 1902. Some of the specific provisions recognize exclusive tribal jurisdiction over reservation-domiciled or resident Indian children, 25 U.S.C. § 1911(a), authorize transfer of off-reservation state court proceedings to tribal court, absent parental objection or good cause to the contrary, 25 U.S.C. § 1911(b), and provide for a tribal right of notice and intervention in child custody proceedings in state courts, 25 U.S.C. §§ 1911(c), 1912(a).

Of note, Congress believed that it was important that these protections be extended not only to children who are tribal members, but also to those who are eligible for membership. As stated in the House Committee Report:

> This minor, perhaps infant, Indian does not have the capacity to initiate the formal, mechanistic procedure necessary to become enrolled in his tribe to take advantage of the very valuable cultural and property benefits flowing therefrom . . . The constitutional and plenary power of Congress over Indians and Indian tribes and affairs cannot be made to hinge upon the cranking into operation of a mechanical process established under tribal law, particularly with respect to Indian children who, because of their minority,

> cannot make a reasoned decision about their tribal and Indian identity.

House Report 95-1386 at 17.

Inclusion of these children is a clear indication of Congress' intent to protect Indian children who have not yet implemented their right to develop their Indian identity.

III. Father is a "parent" within the meaning of ICWA and is entitled to invoke its protections against termination of parental rights.

Under ICWA, an unwed father must either "acknowledge" or "establish" paternity in order to be considered a parent who can assert his rights under the Act. 25 U.S.C. § 1903(9). Petitioners argue that these terms must be interpreted through reference to state law. Pet. Br. at 19-29. Such an approach would be contrary to the statutory scheme and the legislative history.

A. Applying state law in this context would undermine the Congressional goal of establishing uniform federal standards in order to reduce the number of out-of-home placements of Indian children.

There are numerous differences between state statutes as to when a father is considered to have acknowledged or established paternity. *Compare, e.g.*, Nev. Rev. Stat. § 126.72 (2013) (paternity can be presumed if cohabitation or established through scientific evidence) *with* N.J. Stat. Ann. § 9:17-43

(West 2013) (unwed father must attempt marriage, provide support, or file with local registrar). Thus, if Petitioners' theory is accepted, whether an unwed father has rights under ICWA will vary from state to state. Even worse, as was the case here, a father might have to comply with the standards of a state a thousand miles or more from his home—standards that may be very different than the standards of his Tribe or the State in which he resides. For example, if petitioners' theory of state law were accepted here (a theory that was actually not accepted by either the majority opinion or the dissent in the South Carolina Supreme Court[2]), the unwed father could lose his rights to consent to an adoption because he did not pay medical expenses associated with the child's birth, *see* S.C. Code Ann. § 63-9-310(A)(5) (2013), even though this would make little sense in the tribal context since the mother could have given birth at a hospital within Cherokee territory at no cost to the parents. *See* Indian Health Service, *Indian Health Manual* Part 2 Chapter 1 (1983) (IHS services available to "a non-Indian woman pregnant with an eligible Indian's child for the duration of her

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[2] Both the majority opinion and the dissent in the South Carolina Supreme Court found that the father acknowledged and established paternity under state law. *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 560 (S.C. 2012); *Id.* at 574-75 (Kittredge, J., dissent). Both opinions noted that the petitioners had "collapsed" or "conflated" two different questions in raising this issue: whether the father had acknowledged or established paternity under state law (both agreed yes under the facts here) and whether a father who has acknowledged or established paternity would be required to consent to the adoption under state law, a separate issue not relevant to the application of ICWA. *Id.* at 560; *Id.* at 574-575 (Kittredge, J., dissent).

pregnancy through post partum [usually 6 weeks].")

As was said in *Holyfield* in discussing the meaning of the term "domicile" in ICWA,

> Even if we could conceive of a federal statute under which the rules of domicile . . . applied differently to different Indian children, a statute under which different rules apply from time to time to the same child, simply as a result of his transport from one State to another, cannot be what Congress had in mind.

490 U.S. at 46. If the words "fathers" and "father" are substituted for the words "children" and "child", this quote directly applies to the definitions of "acknowledgment" and "establishment". Congress knew how to incorporate "state law" into ICWA when it wanted to incorporate state law. *See, e.g.*, 25 U.S.C. § 1903(6) (definition of "Indian custodian" includes legal custody under State law); 25 U.S.C. § 1921 (providing for the application of State law when it is more protective of parents' rights); 25 U.S.C. § 1922 (recognizing the validity of emergency removals of reservation-resident or domiciled Indian children under State law when they are temporarily located off the reservation). It did not do so here. If different state laws determine who is a parent for ICWA purposes, forum shopping will be encouraged.

Moreover, if Congress had deferred to the sometimes restrictive state laws pertaining to the rights of unwed fathers, this would have undermined the Congressional goal to decrease the number of adoptions of Indian children. As stated by Leroy

Wilder, attorney for *amicus* AAIA, "The bill is not designed to make the adoption of Indian children easier." 1978 House Hearing at 71. Almost 65% of Indian children are born out of wedlock. Centers for Disease Control and Prevention, *Births: Final Data for 2010*, 61 Nat'l Vital Statistics Report 1, 45 (2012). Thus, the extent to which unwed fathers have the right to assert their parental rights will have a significant impact on whether Congress' goal of reducing the disproportionate number of Indian adoptions is met.

B. ICWA protects and strengthens the rights of natural parents.

There is a wide variation between states in terms of how they balance the goals of protecting the rights of unwed fathers and facilitating adoptions. The thumb on the scale in South Carolina is in favor of adoptions by making the exercise of rights by unwed fathers more difficult. In other states, the rights of unwed fathers are given greater protection. *See, e.g.*, La. Child Code Ann. Art. 1137 (2013) (any alleged or adjudicated father may oppose adoption within 15 days of receiving notice). ICWA was clearly meant to err on the side of natural parents, including fathers. See, e.g., 25 U.S.C. § 1913(c) (consent to adoption may be withdrawn for any reason prior to the entry of a final decree of termination or adoption—a right much more "parent-protective" than most state statutes); 25 U.S.C. § 1921 (where state law provides greater protections to the parents, state law applies). As previously described, the legislative history is replete with observations that protecting the rights of natural parents is a key goal of ICWA and in the best

interests of Indian children.

The petitioner argues that recognizing the rights of the unwed father here and similar fathers would "punish Indian children desperately in need of adoptive homes." Pet. Br. at 27. Contrary to petitioners' assertions, however, the principle that a child's best interests are normally tied to a continuing connection with her natural parents and relatives is a central part of federal child welfare statutes that apply to all children. *See, e.g.*, 42 U.S.C. § 622(8)(A)(iv), 42 U.S.C. § 671(a)(15)(B), 671(a)(19), 671(a)(29) (requiring states who receive federal child welfare, foster care and adoption assistance funds [which all states receive] to make reasonable efforts to preserve and reunify families and to give "preference to an adult relative over a non-related caregiver when determining a placement for a child"). Similarly, the idea advanced by the *guardian ad litem* (GAL Br. at 49-53) that best interests analysis must somehow be untethered from the importance of maintaining the relationship between a child and her parents and extended family is a radical idea. Moreover, contrary to the arguments of some *amici* supporting the petitioner, the personal needs of a relinquishing parent should not automatically take primacy over the principle that is at the core of ICWA-that it is in Indian children's best interests to have continuing contact with their extended families and tribal communities. 25 U.S.C. § 1915(a); *see In re Adoption of a Child of Indian Heritage*, 543 A2d 925, 932 (N.J. 1988)

Adoption is a creature of statute. Stephen B. Presser, *The Historical Background of the American*

Law of Adoption, 11 J. Fam. L. 443, 443 (1971). In no state is there an inherent right to be an adoptive parent, nor do relinquishing parents have the absolute right to pick an adoptive couple. States generally recognize that the rights of a relinquishing parent are not co-extensive with the rights of parents who choose to raise their own children. The rights of prospective adoptive couples and relinquishing parents are always subject to whatever terms and conditions the applicable adoption law imposes to advance the best interests of the child.

The facts of this case illustrate why Congress was determined to provide a panoply of protections to biological parents, including unwed fathers. The transfer of the child to South Carolina was based upon a document that failed to identify the child as Native American. *Baby Girl*, 731 S.E.2d at 554 and n.8. If that document had been accurate, Oklahoma would not have approved the transfer. *Id.* at 554-555. The father was not involved in the adoption plan and was not provided with notice until four months after birth—just a week before deployment to Iraq—and he signed the papers without full disclosure of their content. *Id.* at 555. There was no waiting period under state law for placing a child for adoption allowing the child to be placed at birth and no requirement for counseling. These are the types of systemic problems in the private adoption system that have been identified more generally. *See* Part I.C., *supra*.

Many Indian fathers faced with a child placement proceeding are poorly educated, do not know how to respond to such a proceeding or related

events, and may not have access to legal counsel. All of this makes it imperative to bias proceedings away from state law standards that can operate to strip Indian parents of their parental rights and in favor of protecting parental rights to the maximum extent possible consistent with the welfare of the child.

It is a mystery to *amici* how petitioner is interpreting the citation to *Stanley v. Illinois*, 405 U.S. 645 (1972) in House Report 95-1386 at 21 as endorsement for the incorporation of restrictive state laws on unwed fathers into the ICWA. Pet. Br. at 26-27. *Stanley v. Illinois* set a constitutional minimum–states cannot deprive unwed fathers who are engaged at a certain level with their children of parental rights–but there is nothing in *Stanley* that prevents states or (as here) the federal government from providing *greater* rights to unwed fathers.

Recognizing a uniform federal law definition of the meaning of "parent" based upon the plain meaning of the terms in the definition will discourage forum shopping and ensure that adoptions take place only when biological parents, including unwed fathers, have truly consented or are unfit. As Congress found, this is in the best interests of Indian children.[3]

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[3] As the Court below held, ICWA applies regardless of whether a father has acknowledged or established paternity. *Baby Girl*, 731 S.E.2d at 560; accord *id.* at 575 (Kittredge, J., dissenting). Thus, even if a father does not have rights, the tribe may assert its rights under the statute and the extended family may seek placement under the placement preferences in 25 U.S.C. § 1915.

IV. The application of ICWA is not dependent upon prior custody of an Indian child by an Indian parent; the Act is triggered by an Indian child involved in a child custody proceeding and the existing Indian family exception (EIF) should be rejected.

Petitioners urge this Court to adopt the EIF and hold that ICWA's applicability is conditioned on an Indian parent having had custody of an Indian child. Pet. Br. at 29-42. All of the Congressional interests identified in Parts I. and II. of this brief would be undermined if petitioners' argument is adopted.

Petitioners base their argument largely upon an analysis that seeks to establish a uniform meaning of the concept of "custody" throughout the statute. Yet, as Courts have opined, the meaning of the term in ICWA has a "chameleon-like quality, with its meaning changing to adapt to a particular textual context." *In re Adoption of a Child of Indian Heritage*, 543 A.2d at 937. Thus, the Court should interpret the meaning of "custody" within the context that it is used and consistent with the legislative history and the principle that "statutes are to be construed liberally in favor of the Indians . . . ." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Petitioners' specific contention that 25 U.S.C. § 1912(f) gives rise to the EIF is without merit.

First, we agree with *amicus* United States that the meaning of 25 U.S.C. § 1912(f) need not be reached by this Court as it is not relevant to the application of ICWA which requires only that an "Indian child" be involved in a "child custody

proceeding". We also agree that this adoption fails because of the lack of compliance with 25 U.S.C. § 1912(d). U.S. Brief at 10-14, 20-24.

Petitioners assert that it is "unthinkable" Congress intended a prospective adoptive parent to make active efforts to prevent the breakup of the family as required by 25 U.S.C. § 1912(d). Pet. Br. at 31. Where an adoption is truly voluntary, however, this is unnecessary. It is only necessary when an attempted voluntary adoption becomes involuntary. Thus, prospective adoptive parents do not have to actively try to encourage ("cajole") a reluctant unwed father to parent before adopting, but once it is clear that a father (or mother) wants to parent, then active efforts must be made to preserve the family before termination of parental rights can be sought. Congress tried to ensure that voluntary adoptions would occur only when both natural parents consented by enacting 25 U.S.C. § 1913. It is only petitioners' decision to pursue adoption in the face of a parental objection that has triggered this unusual application of 25 U.S.C. § 1912(d).

If this Court concludes that the interpretation of section 1912(f) is relevant to the question before the Court, however, we respectfully disagree with the United States in regard to the proper interpretation of 25 U.S.C. § 1912(f).

25 U.S.C. § 1912(f) provides standards governing Termination of Parental Rights (TPR). TPR is defined in 25 U.S.C. § 1903(1)(ii) as "any action resulting in the termination of the parent-child relationship"—which clearly contemplates a

court decision concerning a future legal relationship. It is not a concept that requires either physical custody or legal custody through a court order.

In fact, a limitation on the application of ICWA similar to what petitioners are seeking was proposed by the Department of Justice in its May 23, 1978 letter reproduced in House Report 95-1386 at 39. The Department suggested that the definition of "Indian child" be changed to require that the child be "eligible for membership in an Indian tribe *and is in the custody of a parent who is a member of an Indian tribe*" (emphasis added), rather than simply requiring that an eligible child be "the biological child of a member". Although Congress adopted 22 of the 30 amendments to the bill proposed by the Departments of Justice and Interior, including provisions such as the right of a parent to object to the transfer of an off-reservation case to tribal court, 124 Cong. Rec. 38103 (1978), it did not adopt this proposed change. Indeed, Rep. Udall responded to the complaints of DOJ regarding the application of the Act to Indian children in the custody of non-Native parents in an October 2, 1978 letter, rejecting their arguments that such children should be excluded on the basis that "foster care placement and termination of parental rights . . . are actions affecting parental, not custodial rights." *Id.* This is a clear indication that petitioners' assertion that Congress did not intend ICWA to apply when an Indian parent has not had prior custody is incorrect.

It is also incorrect because of the impact of such an interpretation. It is a principle of interpretation that statutes should be interpreted to avoid absurd

results. *See, e.g., Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring). The interpretation that petitioners are asking the Court to adopt would lead to absurd results that Congress could not have intended, results utterly inconsistent with the Congressional intent to increase protections for biological parents and extended families and protect tribal prerogatives.

If ICWA is interpreted to require physical custody for its application, then it would exclude in both voluntary and involuntary proceedings:

- Almost all unwed fathers, particularly in the case where the mother has placed the child at birth
- All mothers or fathers who have legal rights and visitation, but not physical custody
- All parents whose children have been placed in foster care
- All parents in the military overseas or in prison

If legal custody through a court order is required, it would exclude:

- Almost all unwed fathers, particularly in the case where the mother has placed the child at birth
- All mothers or fathers who have visitation rights, but not joint legal custody
- Almost all parents whose children have been placed in foster care, since the parents would not have physical custody and the state routinely assumes legal custody

Petitioners' interpretation would deprive an unwed

father who has a fully developed relationship with the child (and many others as well) of any remedy if the provisions ensuring that consents are truly voluntary in section 1913 are violated or ignored.

Under Petitioners' theory not only would these parents be unable to assert their rights, but so would the extended families of these children and the Tribe because Petitioners are asserting that when there is no prior custodial relationship ICWA does not apply, even in involuntary proceedings. This result is contrary to the Congressional goal of protecting the relationship extended families and Tribes have with their children.

No state statute anywhere would deprive these classes of parents from the coverage of its termination statutes. In fact, it would be unconstitutional to do so. *Stanley v. Illinois*, 401 U.S. 645.

Moreover, if Congress intended to create two classes of parents of Indian children, one that is subject to ICWA TPR standards and one that is subject to state law, it certainly would have done something this significant more explicitly and directly. *See* 25 U.S.C. § 1903(1) (Congress excluded divorce and certain juvenile justice proceedings from the coverage of the Act, an indication that it knew how to exclude certain proceedings when it wanted to do so.) Moreover, there is absolutely no legislative history to support such an approach as much of the testimony before Congress involved children removed because they had been left with relatives (no physical custody) or TPR proceedings that took place long

after removal (no physical or "court-recognized" legal custody). House Report 95-1386 at 11, 20. In addition, it is critical to note that the term "parent" in ICWA does not differentiate between Indian and non-Indian parents of Indian children in terms of the exercise of rights under the statute, 25 U.S.C. § 1903(6), an approach inconsistent with Petitioners' assertion that Congress intended that the very application of ICWA itself turn upon whether or not the custodial parent of an Indian child is Indian. Similarly, the definition of "extended family member" does not differentiate between "Indian" and "non-Indian" extended families, 25 U.S.C. § 1903(2), further evidence that Petitioners' theory here is discordant with the statutory scheme.

In short, limiting the application of ICWA to situations where an Indian parent has had prior custody would lead to absurd results that Congress could not have intended, results contrary to the explicit legislative history relating to this issue and every legislative goal that Congress was trying to achieve.

In addition, although petitioners seem to have abandoned an argument based upon the version of the EIF that requires that the parent or child have sufficient contacts with the Tribe, Pet. Br. at 40-41, they still cite cases based upon this theory. Thus, *amici* note that the legislative history clearly reveals that Congress also rejected proposals to include a "significant contacts" test as part of the ICWA. The original bill that passed the Senate included certain restrictions in its application based upon whether a child had "significant contacts" with a Tribe. The

House's final version of the bill (which became law) deleted this requirement and simply applied its provisions to all Indian children as defined by the Act. *See* Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction and the Indian Child Welfare Act,* 79 Iowa L. Rev. 585, 608-609 (March 1994).

Finally, the *guardian ad litem* has alluded to the failure of Congress to adopt legislation overturning the EIF as evidence that Petitioners' interpretation of the Act is correct. GAL Br. at 45-46. This is a spurious argument. The legislation cited addressed numerous ICWA issues, of which the exception was just one. *See* 133 Cong. Rec. S18538 (1987) (statement of Senator Evans). There is no evidence that the Congressional viewpoint about the EIF had anything to do with Congress' failure to enact the proposed amendments. Indeed, as noted in *Crystal R. v. Superior Court*, 69 Cal.Rptr.2d 414, 423, n. 10 (Cal. Ct. App. 1997), there have been a number of bills introduced by both "proponents of the existing Indian family doctrine as well as by those opposing the doctrine . . . without success (citing five bills introduced in the Senate or House)." Respondent Father's brief discusses the decisive rejection of EIF legislation by the Senate committee of jurisdiction in 1996. Resp. Father Br. at 36-37. In the end, it is Congress' clear intent that ICWA cover all Indian children in child custody proceedings that governs this case. As this Court has stated, "failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Central Bank of Denver v. First Interstate Bank*, 511

U.S. 164, 187 (1994).

For all of these reasons, as summarized in Respondent Father's brief, Resp. Father Br. at 36, the vast majority of states have rejected application of the EIF. *Amici* respectfully urge this court to likewise reject the EIF in all of its manifestations.

CONCLUSION

We respectfully request that this Court adopt a federal standard for the meaning of "parent" in ICWA, reject the EIF, and affirm the decision of the South Carolina Supreme Court.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

ADOPTIVE COUPLE,
Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

BRIEF OF *AMICA CURIAE* BIRTH MOTHER IN SUPPORT OF PETITIONERS AND BABY GIRL

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QUESTIONS PRESENTED

(1) Whether provisions of the Indian Child Welfare Act (ICWA) "designed to *prevent the breakup* of the Indian family," 25 U.S.C. § 1912(d), and maintain "the *continued custody* of the child by the parent or Indian custodian," *id.* § 1912(f) (emphases added), apply when an unwed non-Indian birth mother with sole custody voluntarily places her child with an adoptive family.

(2) Whether ICWA's term "parent," which "does not include the unwed father where paternity has not been acknowledged or established," 25 U.S.C. § 1903(9), includes any unwed biological father, including one who has voluntarily declined to take steps to attain legal status as a parent under state law.

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INTRODUCTION AND INTEREST OF *AMICA CURIAE*[1]

The South Carolina Supreme Court held that provisions of the Indian Child Welfare Act (ICWA) "designed to *prevent the breakup* of the Indian family," 25 U.S.C. § 1912(d), and maintain "the *continued custody* of the child by the parent or Indian custodian," *id.* § 1912(f) (emphases added), apply to and trump an unwed non-Indian birth mother's profound and deeply personal decision to place her child with a loving adoptive family through an open adoption that was lawful in every respect under applicable state law.

The state court further held that the biological father of Baby Girl is a "parent" with standing under ICWA to belatedly block her adoption. It reached that conclusion, even though the biological father had voluntarily declined to take steps to attain legal status as a parent under state law and announced to Birth Mother in no uncertain terms that he wished to "give up" his parental rights while Baby Girl was still in utero—rendering his consent to the adoption unnecessary under state law.

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[1] Pursuant to Supreme Court Rule 37.3(a), Birth Mother states that all parties have filed blanket consents to the filing of amicus briefs in this case. Pursuant to Supreme Court Rule 37.6, Birth Mother states that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than Birth Mother and her counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

The state court's interpretation of ICWA is incorrect, and needlessly collides with the constitutional interests of children who have Native American ancestry and the women who carry and bear them. The text of the statute signals at every turn that Congress did not intend ICWA to allow a person who is no more a parent than an anonymous donor of genetic material to override the birth mother's voluntary and considered decision to place her child in an open adoption—based solely on the fact that he is considered "Indian." Rather, where (as here) the unwed biological father voluntarily abandoned the child, rendering his consent to the adoption unnecessary under applicable state law, he does not have standing to invoke the Act to thwart the mother's decision—and convert the traditional "best interests" inquiry into a rule of essentially automatic transfer of custody from an existing adoptive family to him.

The state courts' erroneous interpretation of ICWA raises grave constitutional concerns. Under the South Carolina Supreme Court's interpretation, the statute (1) created parental rights where none exist under state law or the federal constitution, (2) deprived Baby Girl of a best-interests determination and her liberty interest in remaining with the stable and loving adoptive family that had raised her since birth, and (3) nullified a single mother's decision to place her child with petitioners, who shared her values and embraced her continuing involvement in an open adoption arrangement. It did all of that, the state court concluded, on facts that do not touch even the periphery of matters concerning "Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974). Erroneous application of ICWA to these and

similar facts imposes life-altering burdens on children and the mothers who bear them based solely on race or ancestry. *See Rice v. Cayetano*, 528 U.S. 495, 519 (2000). At a minimum, then, ICWA must be construed to avoid the grave constitutional problems that would arise if it applied to adoption proceedings, like this case, where the child is in the exclusive custody of a non-Indian parent who is the only legally recognized parent of the child; the non-Indian parent has voluntarily chosen to place the child for adoption; and the unwed biological father—but for his race—would have no rights whatsoever.

1. *Amica curiae* Birth Mother is the biological and birth mother of Baby Girl, and is the single mother of two other children. Birth Mother was once engaged to be married to Biological Father, though they never lived together. Pet. App. 4a. Their relationship quickly deteriorated once Birth Mother became pregnant. *Id.* at 3a. Biological Father initially tried to use the pregnancy as a means to secure better housing and a pay increase for himself and pressured Birth Mother to marry him as soon as possible. *Id.* at 3a n.3. When she resisted, he levied an ultimatum: Marry me, or I will not support you or have anything to do with this child. *Id.* at 44a. Birth Mother refused to agree to marry him on those terms and, after repeated failed attempts to solicit support of any kind from Biological Father, ultimately ended the relationship. *Id.* at 45a.

Shortly thereafter, still pregnant, she inquired again whether Biological Father would agree to contribute financially, or would rather relinquish his parental rights. *Id.* She explained that she needed to know because she "had choices and decisions of [her] own [she] would need to make." Trial Tr. at 307,

Adoptive Couple v. Baby Girl, No. 2009-DR-10-3803 (S.C. Fam. Ct. Sept. 13, 2011). He responded via text message that he would not support her or the child and that he wanted to "give up" his parental rights. Pet. App. 45a, 89a. Apparently, the fate of his child was not worth even a telephone call.

Biological Father made no further attempt to contact Birth Mother during the pregnancy. *Id.* at 45a. He refused to pay any of Birth Mother's medical or living expenses or accompany her to a single doctor's visit, despite his ability to do so. *Id.* Nor did he inquire about Baby Girl after her birth, even though Birth Mother had told him the baby's expected due date and the hospital where she was to be born. *Id.* at 7a-8a, 48a-49a. Biological Father continued to show no interest in parental rights or responsibilities in the ensuing months, despite knowing that he would soon be deployed overseas for a year. *See id.* at 8a-9a.

2. Birth Mother—who was carrying the child—did not have the option of "texting" her responsibilities away. She was already struggling financially as a single mother of two children. *Id.* at 46a. She "'wanted [her] little girl to have a chance.'" *Id.* (alteration in original). Unable to provide the stable two-parent home she wished for Baby Girl, Birth Mother decided that it would be in Baby Girl's best interest to be placed with a loving adoptive family. *Id.* That was the most difficult decision she has ever made. She hand-picked petitioners, whom she met through the Nightlight Christian Adoption Agency in Oklahoma. *Id.* at 4a-5a. Birth Mother considered other families, including families residing in Oklahoma, but ultimately selected petitioners because they had values similar to her own, could provide Baby Girl a stable and loving

home, and were willing to allow Birth Mother to have a continuing relationship with Baby Girl through an open adoption. *Id.* at 47a.

Contrary to statements made in the brief in opposition to certiorari and various press accounts of this case, Birth Mother was upfront about Biological Father's Cherokee heritage from the beginning and throughout the adoption process. The *undisputed* record demonstrates that Birth Mother disclosed this information on the adoption agency's form, *id.* at 5a-6a,[2] informed her attorney that she believed Biological Father was a card-carrying member of the Cherokee Nation, *id.* at 6a, and provided his correct full name and current address for the purposes of an official inquiry to the Tribe, before Baby Girl's birth, *id.* at 47a. Birth Mother also provided what she believed to be Biological Father's birth date, though she explained that she was not certain of its accuracy. *Id.* at 48a. Birth Mother's attorney then sent a letter to the Cherokee Nation for the purpose of determining whether the tribe would consider Baby Girl to be an "Indian child" within the meaning of ICWA. In that letter, Biological Father's first name was misspelled (an "i" in place of an "e"). Petrs. Br. 8. The Tribe responded on September 3, 2009 that, based on the

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[2] Birth Mother reported Baby Girl's ethnicity as "Caucasian/Native American/Hispanic." At some point, Hispanic was circled. R. 388-89. Birth Mother is predominantly Hispanic. Biological Father is apparently predominantly Caucasian, and is 3/128th Cherokee. GAL Br. at 18. Although the fact that Baby Girl is 3/256th (approximately 1%) Cherokee makes her eligible for membership in the tribe, it would be absurd to suppose that Baby Girl should have been identified (by Birth Mother or anyone else) as ethnically "Native American."

information provided, Biological Father was not a member of the Cherokee Nation and ICWA thus did not apply to the adoption proceeding. *Id.*.[3]

3. Baby Girl was born on September 15, 2009, and she was placed with petitioners the following day. Birth Mother was not required to tell Biological Father of her adoption plan. *See* Okla. Stat. tit. 10, §§ 7503-3.1, 7505-4.2; Pet. App. 46a; Infant Adoption Training Initiative, *Frequently Asked Questions About Adoption in Oklahoma*, at 4, http://www.iaatp.com/docs/FAQs-OK.pdf (last visited Feb. 25, 2013); *see also* Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (And Other Parenthood) After* Lehr *and* Michael H., 43 U. Tol. L. Rev. 225, 243 (2012). Nor was she required to notify the Cherokee Nation (even though she had in fact put the Tribe on notice of her plans when she inquired about Baby Girl's status). *See* 25 U.S.C. § 1912(a); S.C. Code Ann. § 63-9-730; Okla. Stat. tit. 10, § 40.4.

At the time Biological Father was served with notice of the South Carolina adoption proceedings, he had not made any effort to see the baby or even contact Birth Mother, much less contribute financially or otherwise to their care. He signed the notice of service and consent, which asked him to affirm "that he was

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[3] That typographical error hardly evidences an intention to conceal or misrepresent information. Moreover, as the Tribe concedes, even with the misspelling of his first name, there were only eight possible matches for Biological Father's last name and birth year, and Birth Mother had provided his correct address on a military base in Fort Sill, Oklahoma. Pet. App. 48a, 6a. The Tribe's failure to conduct reasonable diligence at that point is—if not grounds for estoppel—relevant to the Tribe's claimed interest in Baby Girl's custody proceedings.

the father of Baby Girl, that he was *not contesting the adoption*, and that he waived the thirty-day waiting period and notice of hearing." Pet. App. 50a (emphasis added). Biological Father later explained that he signed that document because he was somehow under the impression (notwithstanding the document's plain language) that he was signing away his rights only to *Birth Mother*, so that she would raise the child alone and he "'would not be responsible in any way for the child support or anything else as far as the child's concerned.'" *Id.* at 46a.

Having washed his hands of any responsibility for the child, Biological Father was not the least bit concerned at that point that Baby Girl would be raised in a "Hispanic," rather than an "Indian," home. Nor could he, or his extended family, have interfered with Birth Mother's right to direct Baby Girl's upbringing if he later decided that Baby Girl should be exposed to Cherokee culture or embrace tribal affiliation. *See Troxel v. Granville*, 530 U.S. 57 (2000).

Biological Father did not make an effort to see Baby Girl until he was deposed for this case and advised to do so by his attorney. Pet. App. 67a. Because Biological Father had taken no steps to protect his parental rights to the child, it is undisputed—and both state courts held—that his consent to the adoption was not required under South Carolina state law. *Id.* at 21a n.19. *See also* S.C. Code Ann. §§ 63-9-310(A)(5), 63-17-20(B); S.C. Code Ann. Regs. § 114-4730. Nor would his consent have been required under the laws of Oklahoma, Biological Father's home state. *See generally* Okla. Stat. tit. 10, §§ 7501-7505, 7800.

4. In stark contrast to Biological Father's "vanishing act," Pet. App. 42a, petitioners financially supported Birth Mother, spoke to her weekly, and traveled from South Carolina to Oklahoma to visit her during her pregnancy, *id.* at 5a. Petitioners were in the delivery room when Birth Mother delivered Baby Girl, Adoptive Father cut the umbilical cord, and the couple cared for Baby Girl as their child from that moment forward—until they were ordered to hand her over to Biological Father (a complete stranger, because of the choices *he* had made). *Id.* at 7a, 11a. By then, Baby Girl was an active toddler a few months past her second birthday, and petitioners—"Momma" and "Daddy"—were her entire world. Because of the open nature of the adoption, Birth Mother had the opportunity to observe all of this first-hand during her visits with the family. *See* GAL Br. at 16.

While petitioners were raising Baby Girl, they were in contact with Birth Mother at least monthly. They sent her pictures and videos of Baby Girl as she grew. They held up the telephone to let Birth Mother hear Baby Girl babble, laugh, and say her first words. Birth Mother got to hear about every milestone in Baby Girl's young life—her first tooth, when she began to crawl, when she took her first steps, when she said her first words. The families exchanged presents at Christmas and on Baby Girl's birthday.

Birth Mother visited with Baby Girl and petitioners at their home in South Carolina on two occasions. Although she was initially anxious about visiting with the family, when she saw Baby Girl "run with open arms to [Adoptive Mother,] screaming 'Momma Momma' with a huge smile on her face," she felt an

enormous sense of relief and peace about the choice she had made, as painful as it was for her at the time.

When Baby Girl was transferred to Biological Father at the age of 27 months, he immediately cut off all communication between Baby Girl and the only family she had ever known. GAL Br. at 23-24. Birth Mother does not even know Baby Girl's current address. Neither Biological Father nor anyone in his extended family has attempted to contact Birth Mother, even though she has the same address, employer, and telephone number she has had for years. Birth Mother feels enormous guilt for—in her words—having "let my baby down," after making the "hardest decision that I have ever had to make in my whole life."

The state courts' erroneous application of ICWA in this case voided Birth Mother's decision to place Baby Girl with petitioners in an open adoption, and ripped Baby Girl from the only family she had ever known, in derogation of both Birth Mother's and Baby Girl's rights and expectations under state law. Birth Mother therefore has a substantial, and indeed immeasurably profound, interest in the outcome of this case. Having made the heart-wrenching decision to relinquish the care and custody of her child to petitioners—with the expectation that *petitioners* would care for and raise Baby Girl through an open adoption that would allow her to remain a part of her daughter's life, and the belief that Baby Girl's interests would be best served in petitioners' care—Birth Mother is uniquely situated to speak to the profound effect of the decision below on the deeply personal, fundamental, and lawful choices made by child-bearing women.

SUMMARY OF ARGUMENT

Few decisions in a woman's life are more fundamental and personal than the decision to bear a child. For single mothers, the decision may pose particular burdens and challenges. That is particularly so for women in poverty, or near-poverty, already struggling to raise other children, when the would-be father has announced that he will not take any responsibility, financial or otherwise.

Consistent with ICWA, Birth Mother could have raised Baby Girl herself, in a non-Indian home, without any interference from Biological Father, and with no connection whatsoever to the tribe or any of its members. It is entirely implausible to suppose that Congress nevertheless intended to prevent or even discourage adoption as an option for non-Indian women like Birth Mother, with sole physical and legal custody of their children, who will otherwise be making a choice between single parenthood and termination of the pregnancy. *See* Carol Sanger, *Placing the Adoptive Self, in Child, Family, and State* 58, 78 (Stephen Macedo & Iris Marion Young eds., 2003) (noting that "the overwhelming majority of [unwed birth mothers] ... choose either single parenthood or abortion.").

For the reasons explained in petitioners' and the guardian's briefs, the only reasonable reading of the text excludes from the definition of "parent" unwed fathers who have voluntarily rejected a parent-child relationship and thus are not recognized as a "parent" under applicable state (or tribal) law. Even if Congress intended to eschew the ready-made body of state law on the subject and create a uniform federal rule of parenthood specific to unwed Indian fathers, it could not have intended the rule adopted by the South

Carolina Supreme Court. That rule presumes that Congress intended to deviate from the traditional dominance of state law in the sphere of familial relations, and would render meaningless Congress's carve-out for unwed fathers who have not "acknowledged or established" their paternity.

Moreover, where the child involved is neither a member of the tribe, nor has any social or political connection to the tribe, creating an automatic veto right for unwed biological fathers of a particular race—and denying mothers of Indian children the ability to choose adoptive parents (a right afforded to all mothers of non-Indian children)—"'solely because of ... ancestry,'" *Rice*, 528 U.S. at 515 (citation omitted).

ICWA can, and should, be construed to avoid the heart-wrenching result in this case. Doing so not only would give proper respect to the predominant role of state law in this sphere, but avoid serious questions about the constitutionality of tearing stable adoptive families apart in these circumstances based solely on the fact that a biological father has some Indian blood.

ARGUMENT

I. ICWA DOES NOT CREATE AN ADOPTION VETO RIGHT FOR AN UNWED BIOLOGICAL FATHER WHO VOLUNTARILY ABANDONED THE OPPORTUNITY TO DEVELOP A PARENT-CHILD RELATIONSHIP

Section 1903(9) excludes from the definition of "parent" "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). The state court reasoned that an unwed father is a "parent" under ICWA so long as he has a

biological link to an Indian child and contested the adoption after receiving notice. *Id.* at 22a. That interpretation works a revolution in the rights of unwed biological fathers and renders Congress's explicit exclusion meaningless. The only reasonable reading of the text excludes from the definition of "parent" unwed fathers who have voluntarily rejected a parent-child relationship and thus are not recognized as a "parent" under applicable state (or tribal) law.

A. Congress Enacted ICWA Against The Backdrop Of Well Settled State Law And This Court's Decisions Establishing That Biology Alone Does Not Make A "Parent"

1. Neither biological paternity nor one's race has ever been a sufficient basis to remove a child from a loving adoptive home. Familial relationships, including whether a man who has fathered a child is legally recognized as the child's "parent," have traditionally been matters of state law. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) ("'The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" (citation omitted)); *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (parent-child relationship is "a legal status" that "requires a reference to the law of the State which create[s] those legal relationships"). And state law has never entitled a biological father to destroy an existing familial relationship in circumstances like the ones presented in this case.

DNA testing is a relatively recent phenomenon. Until at least the 1980s, there was no reliable method for establishing a father's biological link to a child. State paternity laws historically have focused on

proxies for fatherhood, principally marriage to the birth mother of the child. State laws also historically treated children born to an unwed mother as exclusively within the legal custody of the natural mother, even when paternity was uncontested. In many states, the unwed birth mother had sole decision-making authority over whether to place the child for adoption, irrespective of the putative biological father's contribution to pregnancy-related expenses or his commitment to shouldering the responsibilities of parenthood. *See generally* Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 Seton Hall Legis. J. 363, 390 (1996).

In a line of cases beginning in the early 1970s, this Court identified circumstances in which an unwed biological father has a constitutionally protected interest in the care and custody of his offspring. *See Stanley v. Illinois*, 405 U.S. 645, 649 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 253-54 (1978); *Caban v. Mohammed*, 441 U.S. 380, 397 (1979); *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110, 136 (1989) (O'Connor, J., concurring). "Parental rights," this Court has explained, "do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Caban*, 441 U.S. at 397. The Court has accordingly distinguished between persons with a "mere ... biological link" to a child, *Lehr*, 463 U.S. at 261, and those who have taken timely and substantial steps to provide the care, affection, and financial and emotional support that are required to form a "protected family unit under the historic practices of our society," *Michael H.*, 491 U.S. at 142.

In *Stanley*, the Court held that the state's removal of an unwed father's children without a hearing on his parental fitness violated the father's right to due process and equal protection of the laws. At issue in *Stanley* was an Illinois statute that excluded all unwed fathers from the statutory definition of "parent." 405 U.S. at 649-50. Stanley had lived with the mother for 18 years; mother, father, and children had lived together as a family; and he had contributed to the support and rearing of his children from birth. Upon the death of the mother, the state removed the children from his custody solely because he had not been married to their mother, without any hearing on his fitness as a parent. *Id.* at 646-47. The Court concluded that the state's blanket exclusion of all unwed fathers from the status of "parent" violated the Due Process and Equal Protection clauses of the Fourteenth Amendment. *Id.* at 658-59.

Of course the facts of *Stanley* could scarcely be more different from the facts of this case. But the Court also noted, however, that there was "no constitutional ... obstacle" to excluding those unwed fathers who had not taken the steps required to form a protected parent-child relationship. *See id.* at 657 n.9 ("Unwed fathers ... retain the burden of proving their fatherhood."). And the Court elaborated on this distinction between a mere biological link to a child and a constitutionally protected parent-child relationship in a series of cases over the following decade. In *Quilloin v. Walcott*, for example, a biological father sought to prevent the mother's husband from adopting the child. The biological father had maintained some relationship with the child, but had "never exercised actual or legal custody," and "ha[d] never shouldered any significant

responsibility with respect to the daily supervision, education, protection, or care of the child." 434 U.S. at 256. The Court held that he did not have a protected parent-child relationship and therefore had no right to object to the adoption. *Id.*

Similarly, in *Lehr v. Robertson*, the Court held that a biological father who not established "any custodial, personal, or financial relationship with [the child]" did not have a parent-child relationship that "merit[ed] ... constitutional protection." 463 U.S. at 261. The Court explained that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Id.* at 262. It is only "[w]hen an unwed father demonstrates a *full commitment* to the responsibilities of parenthood by '[coming] forward to participate in the rearing of his child,' [that] his interest in personal contact with his child acquires substantial protection under the Due Process Clause." *Id.* at 261 (quoting *Caban*, 441 U.S. at 392) (emphasis added). If biological father "fails to accept[] some measure of responsibility for his child's" welfare, "the federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." *Id.* at 262.

In the wake of this Court's decisions defining the extent of unwed biological fathers' parental rights, States adjusted their laws to ensure that those unwed fathers who timely "demonstrate[] a full commitment to the responsibilities of parenthood" attain the status of legal "parent," including the right to object to or participate in an adoption proceeding. *Id.* at 261. But those who do not promptly demonstrate such a commitment, or commit too late—often prompted by

learning the mother's adoptive plan—have no right to interfere with the legal parent or custodian's choice of adoptive placement, which will be honored if it is determined to be in the child's best interests.[4]

2. Here, it is undisputed that Biological Father did not meet South Carolina's "general minimum standards by which an unwed father timely may demonstrate his commitment to the child, and his desire ... to assume full responsibility for his child." *Abernathy v. Baby Boy*, 437 S.E. 2d 25, 29 (S.C. 1993); Pet. App. 22a-23a. Consistent with this Court's decisions in *Quilloin* and *Lehr* and the law of other states, in South Carolina an unwed father may not veto, or even participate in, adoption proceedings if he failed to make prompt and substantial efforts to support the birth mother and child before adoption proceedings began. *See, e.g., Roe v. Reeves*, 708 S.E. 2d 778, 785 (S.C.) (biological father who initially abandoned birth mother but then changed

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[4] *See, e.g.*, Ala. Code § 26-10A-9(a)(1), (3); Del. Code Ann. tit. 13, § 1103(a)(2); Fla. Stat. § 63.062(2)(a)(1); Haw. Rev. Stat. § 578-2(a)(5); Idaho Code Ann. § 16-1504(2); Kan. Stat. Ann. § 59-2136(h)(1); Miss. Code Ann. § 93-17-6(4), (5); Mont. Code Ann. § 42-2-610(1), (3); N.C. Gen. Stat. § 48-3-601(2)(b); Ohio Rev. Code Ann. § 3107.07(B); Okla. Stat. tit. 10, § 7505-4.2(C); S.C. Code Ann. § 63-7-2570(3), (4); S.D. Codified Laws § 25-6-4(2), (3), (4); *see also, e.g., Matter of Raquel Marie X.*, 570 N.Y.S.2d 604, 605-06 (App. Div. 1991) (public acknowledgment of paternity, contribution to expenses, and occasional visits deemed insufficient to give biological father right to veto adoption, where he was content to leave the child's care to the mother, despite her frequent complaints of her inability to attend to the needs of two children), *remanded from* 559 N.E. 2d 418 (1990), *cert. denied*, 498 U.S. 984 (1990); *see generally* Ardis L. Campbell, Annotation, *Rights Of Unwed Father To Obstruct Adoption Of His Child By Withholding Consent*, 61 A.L.R. 5th 151 (1998) (survey of state statutes and judicial decisions on the subject).

his mind six months into the pregnancy and lodged objection to planned adoptive placement immediately after child's birth had not "undert[aken] a sufficient effort to make the sacrifices fatherhood demands"), *cert. denied*, 132 S. Ct. 760 (2011). "[I]t is only the combination of biology and custodial responsibility" that gives rise to parental rights. *Abernathy*, 437 S.E. 2d at 28 (citing Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 Ohio State L.J. 313, 368 (1984)).[5]

B. Nothing In The Text, Purpose, Or Legislative History Of ICWA Evinces Congressional Intent To Depart Radically From Prevailing State Law And Create A New Federal Definition Of Parent Based On A Biological Link Alone

Ultimately, respondents' position is that Congress intended to depart radically from these principles when it enacted ICWA. Neither the text, nor the purpose, nor the legislative history of ICWA supports that unsettling conclusion.

Quite the contrary. The text of ICWA is clear that some unwed biological fathers are not "parents" with standing to invoke the Act's parental termination

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[5] Indeed, because Biological Father had not taken any responsibility for Baby Girl, and had affirmatively stated his desire to "give up" his parental rights, Birth Mother could have lawfully refused to reveal his identity when she initiated adoption proceedings. *See Evans v. South Carolina Dep't of Soc. Servs.*, 399 S.E. 2d 156, 157-58 (S.C. 1990) (holding that "blind John Doe" notice of adoption proceeding is sufficient where biological father's consent to adoption is not required under state law, explaining that contrary policy would violate mother's right to privacy).

provisions. Congress explicitly excluded from the definition of "parent" "the unwed father where paternity has not been acknowledged or established." 25 U.S.C. § 1903(9). Congress did not further define the steps necessary for an unwed father to "acknowledge[]" and "establish[]" his paternity for purposes of ICWA's parental termination provision. But Congress was perfectly clear about one thing: its intention to *exclude* some subset of unwed biological fathers who may seek to exploit the Act, but have not taken steps to "acknowledge[] or establish" paternity.

Congress is presumed to have been mindful of the traditional dominance of state law where parent-child relationships are concerned. *See De Sylva*, 351 U.S. at 580 (parent-child relationship is "a legal status" that "requires a reference to the law of the State which create[s] those legal relationships"). "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks and citation omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *United States v. Bass*, 404 U.S. 336, 349 (1971).

In light of these well-settled principles, respondents face an exceedingly high hurdle in attempting to show that Congress sought to upset the state law discussed above in the traditional state-law realm of determining the steps an unwed biological father must take in order to attain status as a parent. "Because domestic relations are preeminently matters of state law, [this Court has] consistently recognized that Congress, when it passes general legislation, rarely intends to

displace state authority in this area." *Mansell v. Mansell*, 490 U.S. 581, 587 (1989). Instead, where Congress leaves a term undefined, in an area traditionally reserved to states, it is appropriate to presume that Congress intended the courts to apply the "ready-made body of state law." *De Sylva*, 351 U.S. at 580; *cf. Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word ... and the meaning its use will convey to the judicial mind unless otherwise instructed."); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it."). The legislative history further confirms that Congress did not intend to displace the body of state law governing the parental status of unwed fathers. *See* H.R. Rep. No. 95-1386, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7540 (explaining that ICWA "do[es] not oust the State from the exercise of its legitimate policy powers in regulating domestic relations").[6]

Mississippi Band of Choctaw Indians v. Holyfield, is not to the contrary. 490 U.S. 30 (1989). In *Holyfield*, Court held that Congress intended the term "domicile" in ICWA's jurisdictional provision, Section 1911(a), to be construed in accordance with the federal law of

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[6] If the unwed biological father is domiciled on an Indian reservation and subject to the exclusive jurisdiction of the tribal court, then presumably tribal law would govern whether he has attained legal status as a parent. *See* Petrs. Br. at 29, 42.

domicile, rather than incorporating state law. *Id.* at 36. But there is no developed federal common law defining parent-child relationships, because Congress and the federal courts have traditionally deferred to state law on such issues. *De Sylva*, 351 U.S. at 580.

2. Even if it were appropriate to infer from congressional silence an intent to have *state* courts applying ICWA fashion a new *federal* definition of "parent," the text of the statute forecloses the rule adopted below.

Congress was unmistakably clear about its intent to exclude some unwed biological fathers from the status of "parent." Under the South Carolina Supreme Court's interpretation, however, *all* biological fathers are "parents" with standing to invoke the Act. According to the state courts below, the biological father "acknowledge[s]" paternity by his very act of objecting to an adoption. And he may subsequently "establish" his biological relationship to Baby Girl through DNA testing. Pet. App. 21a-22a. But Congress did not merely require any unwed biological father eventually to "acknowledge" or "establish" paternity for purposes of obstructing an adoption; rather, it chose the past tense, excluding those who had not "acknowledg*ed* or "establish*ed*" paternity from the class of "parent" entitled to object.

The state courts' interpretation also renders the carve-out meaningless. Under that interpretation, any biological father who belatedly invokes ICWA to try to block an adoption is a parent with standing to do so. In other words, according to the courts below, the category of unwed fathers Congress excluded is a null set. But under ordinary rules of statutory construction, the provision must be construed, if

possible, in a manner that makes this explicit exclusionary clause "meaningful in the statutory definition." *Board of Trustees of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 131 S. Ct. 2188, 2196 (2011) (rejecting the argument that the phrase "invention of the contractor" "'include[s] *all* inventions made by the contractor's employees with the aid of federal funding,'" where that reading "assumes that Congress subtly set aside two centuries of patent law" and rendered part of the phrase meaningless (citation omitted)).

Congress is presumed to have been aware of this Court's decisions and the well-developed body of state law in this area when it enacted ICWA. *See Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) ("[T]he well-settled presumption [is] that Congress understands the state of existing law when it legislates ...."); *accord Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).[7] Nothing in the text, history, or purpose of ICWA indicates that Congress intended to depart radically from the backdrop principle that an unwed biological father must take prompt and substantial steps to take responsibility for a child in order to establish a legal parent-child relationship. There is thus no reason to depart from the normal rule that "[w]ell-settled state law can inform our understanding of what Congress had in mind when it employed a [federal] term it did not define." *Holyfield*, 490 U.S. at 47; *see also Reves v. Ernst & Young*, 494 U.S. 56, 78 n.*

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[7] Indeed, the House Report accompanying the Act explicitly acknowledges explains that ICWA's definition of "parent" "is not meant to conflict with the decision of the Supreme Court in *Stanley*." H.R. Rep. No. 95-1386, at 21, 1978 U.S.C.C.A.N. at 7453.

(1990) ("In the absence of ... alternative sources for discerning the applicability of [a] statutory term ... we are dependent on the state common law at the time of the Act's creation as a basis for a nationally uniform answer to this 'federal question.'").[8]

Because Biological Father failed timely to take responsibility for Baby Girl (and indeed affirmatively told Birth Mother that he wished to relinquish his parental rights), neither South Carolina, nor Oklahoma, nor the United States Constitution recognizes him as a parent with standing to object to an adoption or otherwise assert rights as a "parent" of Baby Girl. ICWA's "acknowledged or established" proviso must too be read to exclude Biological Father from the category of "parents" entitled to invoke the Act.

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[8] The so-called "pro-Indian canon" does not change the result here. For one thing, it is dubious that the canon has any place when the text of a statute, as opposed to an Indian treaty, is involved. *See Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001). In any event, the pro-Indian canon is offset here by the competing canon directing courts to give meaning to the entire provision. *Id.* In any event, the ultimate question for the Court is what Congress intended, and one need not resort to any canons of construction in order to determine that Congress's unambiguous intent to carve out from the definition of "parent" a subset of unwed biological fathers.

II. THE SOUTH CAROLINA COURTS' INTERPRETATION RAISES GRAVE CONSTITUTIONAL CONCERNS

A. A Mother's Fundamental Right To Direct The Upbringing of Her Child Includes The Right To Select An Adoptive Placement Consistent With The Child's Best Interests

1. The South Carolina Supreme Court's interpretation of ICWA not only is at odds with the text, it raises profound constitutional concerns. This Court has long recognized that "'freedom of personal choice in matters of ... family life'" is one of the essential liberties protected by the Due Process Clause. *Quilloin*, 434 U.S. at 255 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)). The rights to conceive and to raise one's children are "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), "far more precious ... than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953); *see also Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 862 (1977) ("One of the liberties protected by the Due Process Clause ... is the freedom to 'establish a home and bring up children.'" (quoting *Meyer*, 262 at 399)).

Parents have the responsibility and privilege of imparting a set of moral principles and values to their children. *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)

("The duty to prepare the child for 'additional obligations' ... must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."); *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). That right and duty encompasses the right to choose who will—and who will not—be responsible for the child's care. *Cf. Troxel*, 530 U.S. at 78 (Souter, J., concurring in the judgment) ("The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character."). Mindful of a mother's unique interest in directing the care and upbringing of her child, this Court has held that she may not be forced to allow paternal grandparents access to her child, because of her "fundamental right to make decisions concerning the care, custody, and control of her two daughters." *Id.* at 60 (plurality op.).

The decision to place a child for adoption falls squarely within the realm of the fundamental parenting decisions protected by the Constitution. A birth mother who places her child for adoption and selects the adoptive parents makes a deeply personal decision that is fundamental to her role as a birth mother, and included within her right to provide care for and influence the destiny of her child. *See* Carol Sanger, *Placing the Adoptive Self*, in *Child, Family, and State* 58, 81 (Stephen Macedo & Iris Marion Young eds., 2003) (the custodial authority of a birth mother includes "the right—and the obligation—to provide care for one's children, whether personally or by arranging for a surrogate caretaker"). Of course, many

times that decision is made by the biological mother and father together. But when, as here, the biological father has voluntarily relinquished any interest in an unborn child, the birth mother's decision is no less fundamental to her role as mother. Indeed, if anything, the decision has even greater implications for the destiny of both mother and child.

2. After Biological Father abandoned Birth Mother she was left with a critical decision to make. As a single mother of two other children and a woman struggling to make ends meet despite being gainfully employed, Birth Mother realized that she could not provide the life that she wanted for her unborn child. Pet. App. 46a. She, like thousands of other women who have been forced to confront similar circumstances, made the difficult, selfless, and deeply personal choice to place Baby Girl for adoption and to provide her with the stable and loving home that she deserves.

Birth Mother endured significant physical, financial, and social sacrifices in order to bring Baby Girl into the world,[9] and took very seriously her responsibility to

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[9] *See* Shari Motro, *Preglimony*, 63 Stan. L. Rev. 647, 654 (2011) ("[F]or a pregnancy taken to term, the consequences [for a birth mother] go far beyond the monetary charges of visits to the obstetrician/gynecologist and the delivery room. Pregnancy may of course be an inspiring and joyful experience, but even smooth pregnancies come with routine difficulties that are more extensive than is generally recognized— including prolonged bouts of nausea and vomiting, back pain, and fatigue. Pregnancy also limits a woman's freedom of movement and it transforms her public identity."); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 373-374 ("The work of gestation thus involves on-going calculations and compromises that can have

find a stable and loving home for Baby Girl with parents who shared Birth Mother's values. She chose petitioners, through the Nightlight Christian Adoption Agency, after having considered a number of other prospective families, including families with some Indian heritage. She chose them because she believed they could provide Baby Girl everything she needed to thrive and that they had values similar to her own. She also appreciated that they were willing to allow her to continue to be involved in Baby Girl's life.

Petitioners proved to be the right choice. They were with Birth Mother for every important stage of her pregnancy and during the delivery of Baby Girl. *Id.* at 5a-7a. They also embraced Birth Mother's desire to have an open adoption through which she could remain a part of Baby Girl's life. Petitioners were in frequent contact with Birth Mother and kept her informed of every milestone in their young daughter's life. They sent her pictures and videos of Baby Girl as she grew from an infant into an active and happy toddler. The families exchanged presents at Christmas and on Baby Girl's birthday, and took family photographs together when Birth Mother came to South Carolina to visit Baby Girl in petitioner's home.

Birth Mother realized, and no one can deny, that petitioners were Baby Girl's family—in every legal and human sense. There is no basis at all to attribute to Congress an intent to create a federal right to break up such families in the circumstances at issue here over

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a pervasive impact on women's lives; its impositions are simultaneously physical and social.").

the objection of the woman who carried and bore the child and selected the adoptive parents.[10]

B. The Court's Erroneous Application Of ICWA Unconstitutionally Interfered With Birth Mother's Right To Select Baby Girl's Adoptive Parents

The state court's erroneous interpretation of ICWA not only allowed Biological Father to override Birth Mother's constitutionally protected rights to direct the upbringing of her child, but did so solely because of Biological Father's and Baby Girl's ancestry. It literally came down to the fact that Biological Father apparently is 3/128th Cherokee. GAL Br. at 18. That makes Baby Girl an "Indian child" under ICWA, but only because the Cherokee Nation—unlike some other tribes—has no blood quantum requirement for membership. If Biological Father had been a descendent of a Florida Seminole, instead of a Cherokee, he would have been out of luck.[11]

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[10] There is perhaps no more difficult decision for a woman, especially for an unwed woman who must go it alone like Birth Mother here, than the decision to place her unborn child for adoption. Presented with such circumstances some women choose simply to terminate the pregnancy. But whatever else is true, there is no basis whatsoever to attribute to Congress an intent to make the *adoption* option more difficult by creating the prospect that that a deadbeat father who has abandoned his rights to an unborn child could come along after the child has been placed with a loving adoptive family in accordance with state law and simply wrench the child from that family, as occurred here.

[11] *See* Seminole Tribe of Florida, *Frequently Asked Questions*, http://www.semtribe.com/FAQ/ (last visited Feb. 26, 2013) ("In order to apply for membership ... you must have a minimum of

To be sure, "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs," *Rice*, 528 U.S. at 519, including legislation that "single[s] out Indians for particular and special treatment" designed "to further Indian self-government," *Mancari*, 417 U.S. at 554-55. Thus, in custody proceedings involving children domiciled on a reservation or who have some other non-biological tribal connection, a federal law designed to prevent the involuntary breakup of the Indian family may legitimately "further Indian self-government." *Mancari*, 417 U.S. at 555; *see Holyfield*, 490 U.S. at 34.

But even if the interest in preserving tribal sovereignty could trump a parents' fundamental rights to direct the child's upbringing—and the child's right to a best interests determination—in voluntary adoptions involving children domiciled on a reservation, that interest is not remotely implicated here. Where, as here, the dispute involves a child who is *not* domiciled on Indian reservation and had no other connection to a tribe, whose parents have never been domiciled on an Indian reservation, whose sole legal and physical custodian was her *non-Indian* birth mother, whose Indian biological father abandoned her in utero—giving the Indian unwed biological father a right to veto the mother's adoption choice, solely based on his ancestry, violates the Equal Protection Clause. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (recognizing a strong presumption that custody determinations based on race are unconstitutional); *see also In re Bridget R.*, 49 Cal. Rptr. 2d 507, 528 (1996) (holding that "any

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one-quarter Florida Seminole blood (that is, one of your grandparents must have been a full-blooded Florida Seminole).").

application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause"), *cert. denied*, 520 U.S. 1181 (1997).

Baby Girl's home was not with an "Indian family," not because her non-Indian birth mother chose adoption, but because her Indian biological father intentionally abandoned her to be raised in Birth Mother's non-Indian (Hispanic) home. Consistent with ICWA, Birth Mother could have raised Baby Girl herself, in a non-Indian home, without any interference from Biological Father, and with no connection whatsoever to the tribe or any of its members.[12]

In these circumstances, the ancestry-based preference (bestowed on a class of unwed fathers) and burden (imposed on Indian children and their mothers) serves no purpose relating to "Indian self-government," *Mancari*, 417 U.S. at 555, and could not stand. The Court may and should save the heartland of the statute by construing it to avoid this glaring constitutional defect. *See INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (where one construction "would raise serious constitutional problems," and "an alternative

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[12] *See* Billy Joe Jones et al., *The Indian Child Welfare Act Handbook* 5 (2d ed. 2008) ("ICWA does not apply to custody disputes between parents, either as part of a divorce or non-divorce proceeding ...."); *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67,587 (Nov. 26, 1979) (ICWA does not apply to any "domestic relations proceeding[] ... so long as custody is awarded to one of the parents").

interpretation of the statute is 'fairly possible,' [the Court is] obligated to construe the statute to avoid such problems") (internal citations omitted); *see also id.* at 299 ("[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

III. ICWA DOES NOT COMPEL A NON-INDIAN UNWED BIRTH MOTHER WITH SOLE PHYSICAL AND LEGAL CUSTODY TO SEEK OUT AN "INDIAN" ADOPTIVE FAMILY FOR HER CHILD

Section 1915(a) of the Act provides that in "any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a).

In dictum, the majority of the South Carolina Supreme Court sought to lay blame for this tragedy on Birth Mother, faulting her for not "plac[ing] Baby Girl within a statutorily preferred home" with an Indian family, rather than with petitioners. Pet. App. 38a. On the majority's view, even if Biological Father had no rights as a "parent," Birth Mother—a non-Indian single mother who was carrying a child who may or may not be 1% Cherokee—had violated ICWA's placement-priority provisions by selecting the loving couple that she did—simply because neither adoptive parent has any known Indian blood. Pet. App. 37a-39a.

That conclusion defies common sense. The only sensible interpretation of § 1915 is that it does not

apply where, as here, the child was not removed from, or adopted out of, an "Indian family." *See* Petr. Br. at 51-53; *see also Holyfield*, 390 U.S. at 36-37 ("[W]here possible, an Indian child should *remain* in the Indian community" to protect "the rights of the Indian community and tribe in *retaining* its children in its society.") (emphases added) (quoting H.R. Rep. No. 95-1386, at 23, 1978 U.S.C.C.A.N. at 7546).

In any event, even if the provision were applicable by its terms, its "good cause" exception must be read to be satisfied here. Congress could not have intended to displace the decision of a non-Indian woman concerning the child who is in her sole physical and legal custody simply because of the genetic contribution of an absent father who has relinquished any parental rights in his unborn child. But that is precisely the result under the state court's interpretation of § 1915. And the result would be the same, on that view, whether the biological father was a former fiancée, an abusive ex-boyfriend, or a sperm donor.

That interpretation is not only entirely implausible, but also raises grave constitutional concerns by once again infringing on a non-Indian birth mother's fundamental and deeply personal choice of an adoptive placement that she believes is in the best interests of the child she carried and gave birth to, in favor of an ancestry-based placement priority scheme. That scheme furthers no interest in tribal sovereignty when applied to the little girl at issue in this case.

CONCLUSION

The decision of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Petitioners,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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QUESTIONS PRESENTED

I. Whether an Indian child's biological father who has expressly acknowledged that he is the child's father and has conclusively established that he is the father through DNA testing is the child's "parent" within the meaning of the Indian Child Welfare Act of 1978 ("ICWA"), 25 U.S.C. §§ 1901-1963.

II. Whether ICWA governs state proceedings to determine the custody of a minor whom all parties concede to be an "Indian child" within the meaning of the Act.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 18 national child welfare organizations with decades of firsthand experience

[1] This brief is filed with the written consent of all parties through universal letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, nor did any party or other person make a monetary contribution to the brief's preparation or submission.

developing and implementing the best practices and policies for child welfare decisionmaking, including custodial determinations. *Amici* are united in their view that, in the Indian Child Welfare Act, Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children, and that it would work serious harm to child welfare programs nationwide for this Court to curtail the Act's protections and standards. Identity and statements of interest of each *amicus curiae* are in the appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

On the law, this case is straightforward. As respondent Father explains, the statutory interpretation questions are controlled by ICWA's plain text and purpose, and were properly resolved by the South Carolina Supreme Court. In practice, the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, is readily administrable by competent professionals in the field who approach their legal and occupational obligations in good faith. What makes this case hard is the same thing that makes an unfortunate number of child custody disputes difficult: the failure of a party (the Adoptive Couple petitioners) to follow established procedures, and the instability in a child's temporary custody that results. No one understands the human toll custody disputes can take more than *amici*, 18 child welfare organizations who have dedicated literally scores of years to the on-the-ground development and implementation of best practices and policies for child placement decisionmaking. *Amici* have seen up close what works, and what does not. In *amici*'s collective

judgment, ICWA works very well and, in fact, is a model for child welfare and placement decisionmaking that should be extended to all children. Much forward progress in the child welfare area would be damaged by rolling the law back.

1. ICWA embodies and enforces the best practices for child custody decisions that should be afforded to all children and in all the varied contexts in which child custody determinations must be made, including prospective adoptions. This best-practices framework happens to be implemented here in the context of Indian children and parents. But that is because Indian affairs is a rare realm in which Congress has direct power to legislate with respect to domestic relations. What is most relevant here is that the protections, stability, consistency, and transparency that ICWA prescribes fully comport with the best framework for custodial decisionmaking for all children, biological parents, foster parents, and prospective adoptive parents.

ICWA establishes the optimal legal regime by which children may become eligible for adoption. It is in the best interests of children, parents, and prospective parents to have a stable legal process that ensures transparency, careful adherence to the law, and full due process before a child's relationship with her fit and willing parent can be permanently cut off by the government. ICWA thus embraces the bedrock principle of child welfare that, prior to a permanent, final placement, it is in the best interests of the child to support, develop, and maintain that child's ties to her acknowledged, interested, and fit birth parents.

2. ICWA's statutory requirement that active efforts be made to support and develop the bonds between a child and her fit birth parents, 25 U.S.C. § 1912(d), implements that principle and reflects the gold standard for child welfare practice that should be aspired to for all children. So too does ICWA's mandate that a child's ties to her parent not be permanently severed absent a finding that a continued relationship with the birth parents would result in "serious emotional or physical damage to the child," *id.* § 1912(f). Those statutory requirements are critical to preserving and supporting the relationships between children and birth parents in the time period before a new family might be formally created through a final adoption, and they are wholly consistent with the best practices and policies that *amici* implement and support throughout the child welfare system.

Congress also recognized in ICWA that there are times when a child's ties to her biological parents should be severed, and that adoption serves a critically important—indeed, essential—role in child welfare at that point. Here, too, ICWA's procedures reflect the highest standards in adoption practice of self-determination, informed decisionmaking, and open communication involving both parents. The point at which a child's ties to one set of parents ends and a new set of parental relationships is formally created is necessarily fraught with emotion and is a pivotal moment in the lives of the child, biological parents, and potential adoptive parents.

ICWA ensures that a child's ties to any acknowledged, interested parent are severed only after both acknowledged birth parents make a

knowing and voluntary decision to permanently relinquish parental rights, and that the parents have sufficient time to reconsider their decision in the time period before a new adoptive family is formed. 25 U.S.C. §§ 1913(a), (c). Those requirements for deliberation and solemnity in the relinquishment of parental ties together give effect to the foundational child welfare principle that, until a new family is formally created through adoption, it is in a child's best interest to support and encourage her ties with her acknowledged, interested parents.

3. Finally, petitioners' invitation to this Court to rewrite the rules in the context of infant adoptions—or to allow court-by-court, case-by-case judgments that refashion the governing legal standards and procedures—threatens to bring about the very harms, instabilities, and inconsistencies against which the *amici* child welfare organizations have long labored. ICWA is a model for best child welfare practices that is now mirrored in numerous state laws. This Court should not destabilize that governing and effective framework. To do so would turn the clock backwards on the practices that *amici* know work best in practice in the multifaceted contexts in which such custodial disputes arise.

ARGUMENT

I. THE BEST PRACTICES IN CHILD WELFARE OF ENSURING STRONG SAFEGUARDS BEFORE SEVERING A CHILD'S TIES TO AN ACKNOWLEDGED, INTERESTED, AND FIT PARENT ARE EMBODIED IN ICWA

In their collective decades of experience on the front lines working within child welfare programs across the United States, *amici* have dealt with a broad variety of substantive and procedural standards governing the care and custody of children. Based on their firsthand experience, *amici* understand intimately what helps and what harms, what works best and what functions poorly. Based on their experience, the child welfare community has developed best practices for child-welfare decisionmaking that bring much-needed transparency and stability to this acutely difficult area of the law and ensure that the best interests of children are protected and advanced.

In formulating federal standards governing custodial decisionmaking for Indian children "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families," 25 U.S.C. § 1902, Congress adopted in ICWA rules that embody and give effect to those best practices in child welfare. Accordingly, in portraying the law as a "[p]referential right[]" (Pet. Br. 3) for Indian parents or children, petitioners get it exactly backwards. Congress adopted the experience-tested, best-practices framework for custody decisions. To be sure, ICWA applies only to Indian children and

parents. But that is because Indian affairs is one of the rare areas falling within Congress's direct, plenary legislative authority over domestic relations. As *amici* can attest, and as the parallel laws of many States reflect, ICWA enforces the gold standard for child welfare decisions for all children. And to unravel its protections could cause significant harm.

A. Best Practices In Child Welfare Encourage And Support The Maintenance Of A Child's Ties To Her Fit And Willing Parents

Amici work in child welfare across the spectrum of proceedings in which the relationships of children to their birth parents are affected, from family support and advocacy services, to foster care and kinship placements, to the permanent termination of parental rights, and to the creation of new families through adoption. Through decades of experience, *amici* have found that the cornerstone of an effective child welfare system is the presumption that children are best served by supporting and encouraging their relationship with fit birth parents who are interested in raising them and are able to do so safely.[2]

This principle is reflected in a number of best practices in child welfare that seek to limit the separation of children from parents, foster reunification, encourage the development of ties with

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[2] *Amici* use "parent" as Congress's plain text indicates—to include all birth parents, excepting only unwed fathers who have not acknowledged or established their paternity. *See* 25 U.S.C. § 1903(9). *Amici* adopt the terminology of the parties and the Questions Presented in referring to "biological" parents.

previously absent fathers, and identify appropriate placements for children who cannot or will not be raised by one or both parents.

First, the standard-setting practice in child welfare is to provide appropriate support and services to parents and families *before* there is any separation of a child from either birth parent. Accordingly, an animating principle for child welfare agencies is to provide the right family support services at the right time. Intensive family preservation services have been shown to significantly reduce the number of children separated from their birth parents. *See* Kristine Nelson, *et al.*, *A Ten-Year Review of Family Preservation Research* 1 (2009). It is likewise a best practice to engage *both* parents and provide services to them before and immediately following birth to support and encourage the development and preservation of child-parent ties.[3]

Early outreach and engagement is particularly important for birth fathers. *See* National Quality Improvement Center on Non-Resident Fathers and the Child Welfare System, *Identifying and Locating Noncustodial Fathers in Child Protection Cases*, Judicial Bench Card 1 (2011) ("Identifying and locating fathers early helps children establish or maintain important connections with their fathers

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[3] Programs serving this role include Nurse Family Partnership, which offers home visits and other assistance to pregnant mothers and first-time parents, *see* http://www.nursefamilypartnership.org/Proven-Results, and Parents as Teachers, which offers services to mothers and fathers of children from birth to age three, *see* http://www.parentsasteachers.org.

and paternal relatives."); ABA Center on Children and the Law, *Policy and Practice Reform to Engage Non-Resident Fathers in Child Welfare Proceedings* (2008).

Second, if temporary separation of a child from her birth parents is unavoidable, the presumptive initial goal of the child welfare system is reunification because, where parents are fit and capable, reunification is the most desirable permanent outcome for children. *See* National Council of Juvenile and Family Court Judges, *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* 5 (2000) ("Consistent with child safety, families should be preserved, reunified and strengthened so they can successfully rear their children."); *see also* Child Welfare Information Gateway, *Supporting Reunification and Preventing Reentry Into Out-of-Home Care* 1 (2012) ("Once a child or youth has been removed from the care of his or her parents, safe and timely family reunification is the preferred permanency option."); Child Welfare Information Gateway, *Family Reunification: What the Evidence Shows* 2 (2011). To this end, it is a best practice to strongly support communication and visitation between, as well as services for, a child and her parents even while a child is in a temporary custodial placement, so that the parental relationship can develop and grow. *See* Casey Family Programs, *Timely Permanency through Reunification* 106-107 (2012).

Third, *amici* are unanimous that it is a best practice to preserve a child's ties with her fit, willing birth parents even if those ties are initially

undeveloped due to separation of the child from the parents shortly after birth, as may happen with an adoption placement made at birth. In fact, child welfare agencies following best practices promote reunification and turn to alternative placement (*e.g.*, adoption) only "when the [birth] family is unable or unwilling to provide for the child's safety and protection." CWLA, Standards of Excellence for Adoption Services § 1.9 (2000) ("Adoption Standards").[4] The Adoption Standards expressly provide that, in proposed at-birth adoptions, "[t]he first goal *** is reunification of the child with the birth parents." Adoption Standards § 4.14; *cf. Santosky v. Kramer*, 455 U.S. 745, 760 n.11 (1982) ("Some losses cannot be measured. In this case, for example, [a child] was removed from his natural parents' custody when he was only three days old; the judge's finding of permanent neglect effectively foreclosed the possibility that [he] would ever know his natural parents.").

Accordingly, special care must be taken when there is an initial voluntary adoptive placement of a child at birth. For such placements, best practices first require that "prospective adoptive parents with whom the child is placed should fully understand the legal risk," and that they be "advise[d] *** that the birth parents may request return of the child." Adoption Standards § 3.5; *see* Donaldson Adoption Institute, *Safeguarding the Rights and Well-Being of Birthparents in the Adoption Process* 44 (2007) (best

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[4] *Available at* http://www.cwla.org/programs/standards/cwsstandards.htm.

practice is to "[l]egally mandate a minimum of several days to a week after childbirth before a relinquishment can be signed and require a significant revocation period during which return cannot be contested, except under extraordinary circumstances[]"). And "[t]he first permanency plan *** is to provide services to the birth parents to determine whether they are willing and able to assume parenting responsibilities for their child." Adoption Standards § 4.14.

Fourth, it is critically important that early efforts be made to identify and involve previously absent fathers. *See* Casey Family Programs, *supra*, at 116. When a child's single custodial parent is unable or unwilling to take care of a child, it is a key best practice in child welfare to locate and seek safe placement with the other parent before seeking any other placement. National Child Welfare Resource Center for Family-Centered Practice, *Best Practice Next Practice: Family-Centered Child Welfare* 17 (2002) ("Before placing a child in an unrelated home, fathers' and paternal family members' homes are assessed for placement."); U.S. Dep't of Health & Human Servs., *What About the Dads?* vii (2006) ("Engaging fathers of foster children can be important not only for the potential benefit of a child-father relationship *** but also for making placement decisions and gaining access to resources for the child.").

Finally, in cases where both parents are unavailable, the next step is to look to a child's extended family. *See* National Council of Juvenile and Family Court Judges, *supra*, at 10–11 (2000) ("An appropriate relative who is willing to provide

care is almost always a preferable caretaker to a non-relative."); Adoption Standards § 1.10 ("The first option considered for children whose parents cannot care for them should be placement with extended family members when a careful assessment clearly indicates the ability, willingness, and capacity of those individuals to care for the children."). Recourse to the extended family is advised because kinship care "maximizes a child's connection to his or her family." Adoption Standards § 8.24; *see* Tiffany Conway & Rutledge Hutson, *Is Kinship Care Good for Kids?* 2 (2007) ("[T]he research tells us that many children who cannot live with their parents benefit from living with grandparents and other family members.") (emphasis omitted); D. Rubin, *et al.*, *Impact of Kinship Care on Behavioral Well-Being for Children in Out-of-Home Care*, 162 Archives of Pediatrics & Adolescent Medicine 550-556 (2008); M. Winokur, *et al.*, *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 Families in Soc'y: J. Contemp. Soc. Sciences 338-346 (2008).

Where, as here, an acknowledged, fit and loving father steps forward soon after birth and immediately upon learning that the birth mother will no longer be caring for the child, best practices in child welfare require that the relationship be engaged and supported. *See* Adoption Standards § 2.2 ("The agency providing adoption services should provide services to birth fathers equivalent to those it provides for birth mothers. Birth fathers have the right to parent their children, with or without the birth mother.").

B. Following Consistent, Transparent, Informed, And Deliberate Procedures Before Severing Parent-Child Ties Is A Critical Component Of Best Practices

In *amici*'s experience, the best outcomes for children are achieved through a consistent and transparent system that provides for due process and fully informed, deliberate decisionmaking before terminating a child's ties to birth parents and formally creating a new family. When the proper procedures are followed and when children "cannot be raised by their birth parents"—and only then—adoption is an essential component of an effective child welfare program because it "is the permanency option most likely to ensure protection, stability, nurturing, and lifelong relationships throughout" childhood and adulthood. Adoption Standards § 1.4.

1. Procedures Must Afford Consistency Through the Application of Rules Rather Than Unstructured, Ad Hoc Judgments

It is a key best practice to require courts to follow pre-established, objective rules that operate above the charged emotions of individual cases and presume that preservation of a child's ties to her biological parents is in her best interests. *See* National Council of Juvenile and Family Court Judges, *supra*, at 14.

This Court, in fact, has recognized that application of the best-interests-of-the-child standard should be guided by substantive rules and

presumptions because "judges too may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 835 n.36 (1977). And courts should not terminate a child's relationship to a parent or parental rights based on "imprecise substantive standards that leave determinations unusually open to the subjective values of the judge," *Santosky*, 455 U.S. at 762-763, without some grounding in a decisional framework of the type that ICWA provides.

This is a case in point. Guided by ICWA's codification of best practices, both the South Carolina trial court and Supreme Court agreed that allowing Baby Girl to be raised by her Father was in her best interests. That stood in sharp contrast to the guardian ad litem's subjective—and, in *amici*'s view, entirely baseless and harmful—judgment that "best interests of the child" have something to do with the prospective parents' provision of "private school[s]" or "beautiful home[s]." *See* Resp. Father Br. 12.

As a corollary to that best practice, the goal of parental unification should not be set aside simply because a child has formed a bonded relationship with a temporary custodian. Of particular relevance here, "any direct placement upon the child's discharge from the hospital is to be seen as a 'legal risk' placement," for which the "first goal" is "reunification of the child with the birth parents." Adoption Standards §§ 3.5, 4.14. Where temporary custody arrangements are warranted, it is best practice to bring temporary custodians and birth parents together in a collaborative process working

towards the goal of preserving a child's ties to her birth parents if possible. *See id.*; Casey Family Programs, *supra*, at 117.

And when decisions must be made regarding the termination of the parent-child relationship, the best practice for ensuring consistent, careful, unbiased decisionmaking that does not depend on the vagaries of temporary custodial arrangements is to have a two-step process. The first step is to decide whether a child's birth parent is currently able and willing to safely raise her. If so, the second step is to enforce a presumption that it is in the child's best interest to be in the care of that birth parent. Only if the answer is negative at the first step should other placements, including the child's then-existing relationships with temporary caregivers, be considered. *See* Adoption Standards § 4.24 (only once "return to the birth parents is not possible" and "relative adoptions have been ruled out" should an agency "identify and prepare a new, unrelated adoptive family for the child.").[5]

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[5] This best practice is reflected in many States' laws. *See* Child Welfare Information Gateway, *Determining the Best Interests of the Child: Summary of State Laws* 2 (2012) (a preference for family integrity is the most frequently stated guiding principle in state statutes for determining the best interest of the child); *see also In re Michael B.*, 604 N.E.2d 122, 130 (N.Y. 1992) ("To use the period during which a child lives with a foster family, and emotional ties that naturally eventuate, as a ground for comparing the biological parent with the foster parent undermines the very objective of voluntary foster care as a resource for parents in temporary crisis[.]"); *In re Halloway*, 732 P.2d 962, 971-972 (Utah 1986) ("The adoptive parents argue that we should consider the bonding that has taken place

2. Voluntary Relinquishment Should Be Accomplished Only through Careful Adherence to Open, Informed, and Deliberate Procedures

Transparency and deliberate decisionmaking sit at the core of best adoption practices. "All adoption services should be based on principles of respect, honesty, self-determination, informed decision-making, and open communication." Adoption Standards at 6.

To further those goals, a key standard of best adoption practices is that *both* parents be supported and "fully informed" regarding the adoption, and that the child welfare or adoption agency should not accept a voluntary relinquishment of a child until both of "the birth parents have received full and accurate information about the consequences" of their decision, have had "an opportunity to reach a decision that they recognize is best for both themselves and the child," and "have come to understand that their decision is a final one, consistent with *** statutory time frames for revocation." Adoption Standards § 2.5. Both parents should be involved because "[b]irth fathers have the right to parent their children, with or without the birth mother," and "the agency should work closely with [the birth mother]" to identify and locate the birth father. *Id.* § 2.2.

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between themselves and Jeremiah in reaching a decision in this matter. *** Such a standard would reward those who obtain custody *** and maintain it during any ensuing (and protracted) litigation.").

If there is disagreement between the parents, the Standards support providing "skillful counseling *** to help all parties reach agreement," but in any event an agency "should provide services to birth fathers equivalent to those it provides for birth mothers." Adoption Standards §§ 2.1, 2.2. Best practices recognize that a birth mother might desire to avoid communication with an estranged birth father. For that reason, the Standards place the obligation to affirmatively contact and engage the absent parent upon the agency—whose client is neither the birth mother, nor prospective adoptive parents, but the child and her best interests. *Id.* at 5, §§ 2.1, 2.2.

3. Timely and Transparent Decision-making According to Legislative Procedures that Guide the Best Interests Inquiry Is the Best Practice for Minimizing the Disruption to Children

It indisputably can be difficult for children to shift from one custody arrangement to another. *Amici* witness that pain firsthand far too frequently. The best practices in child welfare work to limit the adverse effects of such disruption by mandating careful adherence to procedures that minimize errors in temporary or initial custodial placements. For example, the maintenance of open communication, transparent proceedings, and deliberate decision-making in adoption proceedings ensures that no placement is made until both birth parents have reached a final and affirmative decision that it is in the best interest of the child to sever parental ties and be placed permanently in a different custodial

arrangement. When the governing legislative procedures are adhered to, there is less risk of an erroneous temporary placement that must be undone. Best practices thus mandate that, "[w]hen American Indian children are placed with adoptive families, the agency providing adoption services should comply fully with the provisions of" ICWA. Adoption Standards § 3.9.

A second vital practice is for courts to expedite decisions in this area. The answer to the "concern that shuttling children back and forth *** may be detrimental," is for courts to "protect the well-being of the affected children *** through the familiar judicial tools of expediting proceedings and granting stays where appropriate." *Chafin v. Chafin*, 133 S. Ct. 1017, 1026-1027 (2013). The way to avoid disruptive shifts in custody, in other words, is by adherence to the law and best practices in the first instance, not to "'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation,'" *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989) (citation omitted).

It would turn child welfare best practices upside down if temporary foster care or contested non-final adoptive placements, however erroneous, could justify courts' disregard of governing legislative rules providing substantive and procedural safeguards for preserving a child's ties to her fit and willing birth parents. Rather, best practices avoid such an outcome by engaging both birth parents early in the process, evaluating their ability and willingness to parent their children, and transparently and consensually finding a suitable adoptive placement

for the child if that is required. To be sure, once an adoptive family is formally created in accordance with those procedures, the adoptive parents gain the same fully-protected status as birth parents—but not before then.

Again, this is a case in point. The acknowledged heartbreak of a child leaving a temporary custody situation after two years is the consequence of the petitioners' adoption agency's circumvention of governing Oklahoma and federal law and the failure to adhere to best practices which *amici* have long advocated—not an improper delay in the biological father's expression of his interest. The conduct in this case—(i) the apparent rush to remove Baby Girl from Oklahoma without the involvement of Father or his family, Pet. App. 7a, (ii) concealment of the decision to place Baby Girl for adoption from Father until four months *after* she had been removed from Oklahoma (and, even then, to confront him in a parking lot with papers rather than engaging him constructively consistent with best practices), *id.* at 8a-9a, and (iii) petitioners' efforts "to prevent Father from obtaining custody of Baby Girl since she was four months old," *id.* at 27a—conflicts with professional standards in the field (as well as the law).

Specifically, petitioners would not have been able to take Baby Girl to South Carolina had the proper Oklahoma procedures been followed. Pet. App. 8a. That is because Oklahoma law precludes the out-of-state placement of any child who falls within ICWA unless the Oklahoma Administrator of the Interstate Compact on the Placement of Children first ensures compliance with ICWA. *See Cherokee*

Nation v. Nomura, 160 P.3d 967, 977 (Okla. 2007). Under both ICWA and the Oklahoma Act, the express consent of Father was required for any adoptive placement. *See In re Baby Boy L.*, 103 P.3d 1099, 1105-1106 (Okla. 2004) (under state law, ICWA applies, including its parental-consent requirements, even when an unwed non-Indian mother placed a child for adoption at birth). Accordingly, had petitioners' adoption agency not misreported Baby Girl's ICWA status on the placement form, the compact administrator would not have approved the out-of-state placement. *See* Pet. App. 8a n.8.

It thus would be particularly inappropriate for petitioners' contested custody to overcome Oklahoma's and Congress's policy judgment, grounded in best practices, in favor of supporting and preserving a child's ties to her birth parents. *See* OKLA. STAT. title 10, § 40.3. Compliance with the law also would have prevented the problem of which petitioners and the guardian ad litem now complain: that once they had the child in their home for a significant period of time, the law should find a way for them to be allowed to keep the child permanently. For very good reason, neither the law nor best practices work that way.

C. Those Best Practices Are Consistent With The Nation's Deep-Rooted Traditions

This Court has long recognized the deep roots in our society of the best-practices presumptions that (i) fit and willing parents act in their children's best interest, and (ii) termination of the child-parent

relationship demands the most careful adherence to deliberate procedures.

This Court has characterized "[t]he liberty interest *** of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Accordingly, "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Santosky*, 455 U.S. at 760.

Those "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Because "there is a presumption that fit parents act in the best interests of their children," the law should generally not "inject itself into the private realm of the family to further question the ability of that [fit] parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68–69. Indeed, even "when blood relationships are strained," so long as "there is still reason to believe that positive, nurturing parent-child relationships exist," the interest of the State in child welfare "favors preservation, not severance, of natural familial bonds." *Santosky*, 455 U.S. at 753, 766-767.

The vast majority of States likewise recognize the presumption that it is in a child's best interest to preserve, develop, and support ties to her fit birth parents unless and until those ties must be permanently severed. This presumption is reflected

in the common law and state statutes.[6] When fit parents contest custody against non-parents, state judges are generally not free to exercise unbridled discretion. Instead, the starting point is a rebuttable presumption that promoting and strengthening a child's ties with an interested birth parent is consonant with the child's best interests. *See, e.g.*, *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992) ("[A]doptions are solely creatures of statute. *** [W]ithout established procedures to guide courts in such matters, they would 'be engaged in uncontrolled

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[6] *See, e.g.*, *Smith v. Smith*, 97 So. 3d 43, 46 (Miss. 2012) ("In custody battles between a natural parent and a third party, it is presumed that it is in the child's best interest to remain with his or her natural parent."); *Ex parte A.R.S.*, 980 So. 2d 401, 404 (Ala. 2007) ("This Court has repeatedly recognized a presumption in favor of a child's natural parents[.]"); *In re Guardianship of B.H.*, 770 N.E.2d 283, 287 (Ind. 2002) (recognizing "the important and strong presumption that the child's best interests are ordinarily served by placement in the custody of the natural parent"); *Price v. Howard*, 484 S.E.2d 528, 534 (N.C. 1997) ("A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child."); *Paquette v. Paquette*, 499 A.2d 23, 30 (Vt. 1985) ("[W]e agree with those courts that recognize a presumption that the best interest of a child will be served by granting custody to a natural parent."); UTAH CODE ANN. § 62A–4a–201(1)(c) ("It is in the best interest and welfare of a child to be raised under the care and supervision of the child's natural parents."); CONN. GEN. STAT. § 46b-56b ("In any dispute as to the custody of a minor child involving a parent and a nonparent, there shall be a presumption that it is in the best interest of the child to be in the custody of the parent[.]").

social engineering.'"); *cf. In re Michael B.*, 604 N.E.2d 122, 127 (N.Y. 1992) ("A biological parent has a right to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit to assume the duties and privileges of parenthood, even though the State perhaps could find 'better' parents.").

Of course, once an adoption is finalized, that new parent-child relationship gains equivalent stature under our traditions. *See Smith*, 431 U.S. at 844 n.51 ("Adoption *** is recognized as the legal equivalent of biological parenthood."). But until an adoption is finalized, it is consistent with both best child welfare practices and this Nation's deep-rooted traditions to recognize a presumption in favor of custody by a fit and willing birth parent, regardless of emotional bonds developed in temporary custodial placements. *Cf. Santosky*, 455 U.S. at 761 (Court had "no difficulty finding that the balance of private interests strongly favors heightened procedural protections [for birth parents].").

D. ICWA Implements And Enforces Those Child Welfare Best Practices

In ICWA, Congress was faced with the need to develop a body of family law in one area where Congress, rather than the States, can directly legislate regarding such matters—Indian affairs. *See* 25 U.S.C. § 1901(1) (invoking "Congress['s] *** plenary power over Indian affairs"). The body of law that Congress developed applies across a broad range of involuntary proceedings to terminate parental rights, regardless of the post-termination placement of children. *See id.* § 1912(a) (governing any

"involuntary proceeding in a State court" seeking foster care placement or termination of parental rights); *id.* § 1903(1) ("child custody proceeding" includes any foster care placement, termination of parental rights, preadoptive placement, or adoptive placement). In developing federal standards to apply across that range of parental-rights termination proceedings, *id.* § 1902, Congress properly embraced for Indian children the key best practices that in *amici*'s experience serve the best interests of all children.

1. ICWA Encourages and Supports the Maintenance of a Child's Ties to Her Fit and Willing Parents

Consistent with child welfare best practices, Congress sought in ICWA to increase the likelihood that parent-child and familial relationships would be preserved by requiring that "active efforts" to support and develop a child's relationship with her birth parents be made before that relationship is permanently ended. Specifically, ICWA requires that any party seeking to "terminat[e] *** parental rights to[] an Indian child under State law" must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d); *compare* Adoption Standard § 2.5 (establishing counseling and support services for both birth parents as a best practice).

Also fully consistent with best practices in child welfare is the requirement to engage extended families in order to support, develop, and maintain

family relationships. *Compare* 25 U.S.C. § 1915(a)(1) (instituting preference for placement with "a member of the child's extended family" when it is necessary to terminate parental relationships), *with* Adoption Standards at 6 ("[T]he extended family should be supported as the first option for adoptive placement, if appropriate.").

ICWA also implements the best practice principle in child welfare of presuming that it is in a child's best interests to preserve her ties with a birth parent who is fit and interested in raising her. ICWA does so by limiting the "termination of the parent-child relationship," 25 U.S.C. § 1903(1)(ii), to circumstances in which "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," *id.* § 1912(f); *compare* CWLA, Standards of Excellence for Services to Abused and Neglected Children and their Families § 1.24 (1998) ("The removal of a child from the home *** is a drastic action that should be considered only when there is imminent danger to the child's life and safety, or when other measures to alleviate risk have failed or will not provide sufficient protection.").

Contrary to petitioners' argument (Br. 35-39), it is fully consistent with best practices, as well as state practice involving similar statutes, for ICWA to speak in terms of "returning" a child to a birth parent, or "removing" a child from a birth parent, even if that parent never had custody, or had custody for only a brief moment at birth. For example, in *In re Michael B.*, the New York Court of Appeals explained that state law requiring the child welfare agency to make "reasonable efforts" for a child to

"return to the natural home" included efforts to support the birth father's relationship with the child, even though the father's identity was unknown when the child was placed in foster care and the child had never lived with him. *See* 604 N.E.2d at 314-315.

Thus, in mandating a strong showing of parental unfitness in any involuntary termination proceeding and especially in requiring active efforts to support existing child-parent relationships before they are permanently and irrevocably severed, 25 U.S.C. §§ 1912(d), (f), ICWA is consistent with *amici*'s field-tested experience and developed research regarding how best to achieve the most favorable outcomes for vulnerable children and families.

Moreover, ICWA—and child welfare practice broadly—strongly reject the sorts of relative comparisons of the suitability of birth parents and prospective adoptive parents that petitioners and the guardian ad litem urge here. *Compare* Pet. Br. at 7-8, *with* Department of the Interior – Bureau of Indian Affairs Guidelines for State Courts, 44 Fed. Reg. 67,584, 67,593 (Nov. 26, 1979) ("A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or [because] it would be 'in the best interests of the child' for him or her to live with someone else.").

2. *ICWA Requires the Use of Consistent, Transparent, Informed, and Deliberate Procedures before Irrevocably Severing Parent-Child Ties*

In ICWA, Congress balanced support for fit birth parents who are interested in preserving filial ties

with support for the formal creation of new adoptive families when necessary. In *amici*'s view, legitimate, regularized adoptions are an extremely important part of the child welfare system, and ICWA recognizes, affirms, and protects the stability of a new family unit once that family has been formally created and recognized through proper adoption procedures. *See, e.g.*, 25 U.S.C. § 1913(d) (limiting circumstances in which a finalized adoption may be challenged under federal law).

But up until the formal creation of a new family through proper processes, ICWA provides a procedural framework that fully implements the best practices of transparent and deliberate decisionmaking.

First, ICWA ensures consistency by enforcing a uniformly applicable presumption in favor of maintaining parent-child ties, rather than allowing unguided judicial decisionmaking that risks infusing the best-interests-of-the-child standard with case-specific dynamics or biases—such as the baseless stereotypes that the guardian ad litem voiced here, describing the American Indian culture as "including free lunches and free medical care and *** their little get togethers and *** their little dances." Trial Tr. 634; *see generally* 25 U.S.C. § 1912(f); *see also* H.R. Rep. No. 95-1386, 95th Cong., 2d Sess. 19 (1978) (the purpose of ICWA is to serve the best interests of children, but without structure the best interest standard "is vague, at best").

Second, ICWA implements transparency and open communication with respect to adoption proceedings by requiring the party seeking

termination of parental rights to provide specific notice to both parents. 25 U.S.C. § 1912(a); *compare* Adoption Standards §§ 2.1, 2.2 (requiring communication with both birth parents). And it furthers deliberate decisionmaking by establishing procedures that ensure a parent fully understands his decision to relinquish parental rights, is doing so voluntarily, *id.* § 1913(a), and has sufficient time to reconsider the decision within the time period before a new adoptive family is formed, *id.* § 1913(c). These ICWA procedural safeguards are fully consistent with the highest standards in child welfare. *See* Adoption Standards §§1.9, 2.5.

II. ICWA REFLECTS CONGRESS'S JUDGMENT TO ADHERE TO BEST PRACTICES IN CHILD WELFARE, NOT AN INVALID PREFERENCE

A. ICWA Embodies The Best Child Welfare Practice Standards For All Children In An Area Within Which Congress Is Empowered To Legislate

ICWA embodies and gives effect to the best practices, long endorsed by *amici* and echoed in the laws of multiple States, governing the most effective and protective child custody procedures and decisionmaking for all children and families. To be sure, Congress confined its judgment in this statute to Indian children. But that is simply because Indian affairs is one of the rare areas in which Congress exercises direct legislative authority over family law, which is otherwise broadly governed by the States. What is critical is that the lines Congress drew, the balances it struck, and the policy judgments it made

are all solidly grounded in the very best practices for child custody and, indeed, are reflected in the laws of many States as the best practice for *all* child custody decisions. *See* Section I.C, *supra*.

For that reason, petitioners' effort (Br. 43-51) to portray ICWA as creating some special and unwarranted preference for Indian parents is flatly wrong. Congress chose the pathway and practices that are best for *all* children; its legislative reach was just narrower because Congress's direct legislative authority over child welfare matters is narrow, including only a few specialized areas like Indian affairs.

Furthermore, Congress's concern for child welfare best practices is not limited to Indian children, but is reflected in federal legislation addressed to all children. *See* Fred Wulczyn, *Family Reunification*, 14 Children, Families, and Foster Care 95, 96 (2004). For example, the Adoption Assistance and Child Welfare Act of 1980 hinges federal matching funds for foster care expenditures on state law's provision that, in each case, "reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." Pub. L. No. 96-272 § 101, 94 Stat. 501, 503; *compare* ICWA, 25 U.S.C. § 1912(d) (requiring "active efforts").

The Adoption and Safe Families Act of 1997 amended the "reasonable efforts" standard by providing some aggravated circumstances in which it would not apply, but otherwise reaffirmed Congress's commitment that "reasonable efforts shall be made to

preserve and reunify families" before children are permanently placed elsewhere. 42 U.S.C. § 671(a)(15). And Congress has also funded the kinds of services that are components of the best practices for supporting vulnerable families, such as community-based family support and preservation services, including "preplacement preventive services." *Id.* § 629(a)(1)(B).

Finally, Congress reiterated its judgment that the maintenance of family ties through preferences favoring placement with extended family is in the best interests of all children. *See* 42 U.S.C. § 671(a)(19) ("[T]he State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards."); *see also Miller v. Youakim*, 440 U.S. 125, 142 n.21 (1979) (noting "Congress' determination that homes of parents and relatives provide the most suitable environment for children").

B. Congress Made A Child-Welfare Policy Choice To Apply ICWA's Safeguards To Acknowledged, Unwed Fathers

It is no accident that Congress defined "parent" as it did in ICWA. Contrary to petitioners' contention, Congress's judgment to extend ICWA's gold-standard procedural safeguards to all acknowledged or established biological fathers was not a departure from "established principles" (Pet. Br. 26), but instead was fully consistent with child welfare best practices. Acting against a backdrop of

state laws reflecting a varied approach to protecting a child's nascent relationship with an unwed birth father, Congress made the policy judgment, which many States then shared, that it was in the best interest of children to protect the relationship between a child and a fit, loving father, especially one who (as in this case) always acknowledged paternity and took action to preserve his parental ties immediately upon learning that they might be irrevocably severed. That judgment is consistent with best adoption practices, and subjecting it to the varied happenstance of state laws would defeat that judgment.

1. Congress Enacted ICWA Against a Backdrop of State Laws Reflecting No Consensus Regarding Unwed Fathers

Prior to the enactment of ICWA, this Court had ruled that a State could not, consistent with the Constitution, exclude all unwed fathers from its laws protecting the parent-child relationship. *See Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."). The Court had also held, however, that the Constitution does not require that States allow an unwed father who neither lived with nor made any effort to legitimate his child for eleven years to veto a stepfather's adoption of the child. *See Quilloin v. Walcott*, 434 U.S. 246, 254 (1978).

In cases decided after ICWA's enactment, this Court explained that the due process clause afforded

States flexibility in the degree of protection afforded to a father's constitutional interest in the "opportunity *** to develop a relationship with his offspring" when he had not yet developed such a relationship. *See Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (statute giving notice of adoption proceeding only to unwed fathers who register or who meet certain other requirements "adequately protected [father's] inchoate interest in establishing a relationship" with his child).

As this Court has repeatedly emphasized, however, what the due process clause requires and what a legislature may determine is advisable are two different things. *See Robertson*, 463 U.S. at 264 ("Regardless of whether we would have done likewise if we were legislators instead of judges, we surely cannot characterize the state's conclusion as arbitrary."). Consistent with this Court's precedent, States have taken differing approaches to the protection of nascent ties between children and unwed fathers. At the time of ICWA, many States took the view that the best practice was to offer an opportunity for the development and preservation of a child's ties with an acknowledged and interested biological father before irrevocably severing ties through the placement of a child with new parents. At least 16 States, in fact, had adopted the balance drawn by Congress of protecting a child's ties to an acknowledged or established father.[7] Other States

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[7] *See, e.g.* ARIZ. REV. STAT. ANN. § 8-106 (Supp. 1978) (consent of both natural parents necessary); OR. REV. STAT. § 109.312 (1977) (same); R.I. GEN. LAWS § 15-7-5 (1977) (same); S.D. CODIFIED LAWS. § 25-6-4 (1976); WIS. STAT. § 48.84 (1978)

allowed extinguishment of an unwed father's parental ties based on the degree of support provided before the birth, or they required unwed fathers to act very quickly following a child's birth (and before notice of a potential adoptive placement) to preserve the ties.[8] There was no consensus among States as to which approach best served the interests of the child.

Against that backdrop of multiple constitutionally permissible choices, Congress incorporated into ICWA the very best child welfare practices by extending ICWA's procedural safeguards to the nascent ties between acknowledged, interested birth fathers and their children. Congress did this by providing a uniform federal definition of "parent" that expressly includes all biological fathers whose paternity is acknowledged or established. 25 U.S.C. § 1903(9). Congress, moreover, defined that status

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(same); CONN. GEN. STAT. §§ 45-61d, 45-61(i)(b)(2) (1978) (father's consent required if paternity acknowledged or judicially established); FLA. STAT. § 63.062 (1979) (same); KY. REV. STAT. ANN. § 199-500 (West 1978) (same); N.M. STAT. ANN. § 40-7-6 (1978) (same); ALA. CODE § 26-10-3 (1975) (father's consent required when his paternity judicially established); OHIO REV. CODE ANN. § 3107.06 (Page Supp. 1978) (same); MINN. STAT. §§ 259.24(a), 259.263(a) (1978) (father's consent required when identified on birth certificate); N.H. REV. STAT. ANN. § 170-B:5 (1977) (father's consent required if files notice of intent to claim paternity within set time from notice of prospective adoption); WASH. REV. CODE § 26.32.040(5) (1976) (same); W. VA. CODE § 48-4-1 (1976) (father's consent required if father admits paternity by any means).

[8] *See Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations*, 1979 WASH. U. L. Q. 1029, 1059-1062 (1979) (surveying laws regarding biological father's consent rights).

without reference to state law. *Id.* In contrast, when Congress intended to incorporate varied state law within a defined term in ICWA, it said so expressly. *See id.* § 1903(6) (defining "Indian custodian" to mean "any Indian person who has legal custody of an Indian child *** under tribal law or custom or under State law"). Congress likewise incorporated state law expressly in the definition of "parent" in other child welfare statutes when it so intended. *See* 42 U.S.C. § 675(2) ("The term 'parents' means biological or adoptive parents or legal guardians, as determined by applicable State law.").

This definitional policy choice is simply one more manifestation of the cornerstone child welfare principle running throughout ICWA—that the best practice in child welfare is to preserve and support family ties by procedurally protecting the opportunity for a child to develop and maintain a relationship with a fit, interested, and acknowledged birth parent.

Although the plain text of ICWA's definition of "parent" confirms Congress's policy choice, other provisions of the Act and the legislative history of ICWA corroborate Congress's concerns, not just with the removal of children from developed family relationships, but also with preventing the severance of nascent family ties and supporting and encouraging parental involvement. *See, e.g.*, 25 U.S.C. § 1913(a), (c) (invalidating consent to adoption prior to or within 10 days of birth and permitting revocation of consent "at any time" prior to finalization of adoption); H.R. Rep. No. 95-1386, *supra*, at 12 (noting concern with voluntary relinquishment of parental rights at the hospital); *Indian Child Welfare Program: Hearings before the*

Subcommittee on Indian Affairs, 93d Cong., 2d Sess. 75-77 (1974) (collecting statistics regarding the adoption of Indian children in Minnesota, a large majority of which were infant adoptions under three months of age). Congress, in short, made a reasoned, entirely legitimate, and—in *amici*'s judgment, the preferred—choice among legislative approaches to these difficult child custody issues.

2. Congress's Judgment Would Be Undermined If Subjected to a Patchwork of State Laws

ICWA's purpose of establishing a framework for all child custody proceedings involving Indian children, 25 U.S.C. § 1902, would be destroyed if the critical issue of a child's opportunity to develop and preserve a relationship with her birth father were to be rendered dependent on the happenstance of the birth State, let alone the State of residence of prospective adoptive parents as petitioners contend.

Today, as in 1978, there is no consensus in state law regarding the extent to which adoption and other termination procedures should protect the opportunity for a child and an interested, fit birth father to develop and preserve a parent-child relationship. Many States, however, continue to share Congress's and *amici*'s judgment that it is a best practice to afford strong procedural safeguards before this nascent child-parent relationship is permanently terminated.[9] To subject ICWA to the

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[9] *See, e.g., Jared P. v. Glade T.*, 209 P.3d 157, 160 (Ariz. Ct. App. 2009) (biological fathers must receive notice of an adoption and may preserve parental rights upon post-notice steps to establish

vicissitudes of state law would nullify that congressional judgment.

Finally, this Court presumes that, "'in the absence of a plain indication to the contrary, *** Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Holyfield*, 490 U.S. at 43 (quoting *Jerome v. United States*, 318 U.S. 101, 104 (1943)). This rule of construction is particularly appropriate in the context of ICWA, where "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities." *Id.* at 45. No less than with the undefined term "domicile" in *Holyfield*, Congress "could hardly have intended the lack of nationwide uniformity that would result from state-law definitions of" parent. *Id.* "[A] statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind." *Id.* at 46.[10]

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paternity); ME. REV. STAT. Title 18-A §§ 9-201(a)-(d), 9-302 (biological father entitled to notice and opportunity to establish paternity prior to adoption); NEV. REV. STAT. § 127.040(1)(a) (both parents must consent to an adoption); VT. STAT. ANN. Title 15A §§ 2-401, 2-402 (identified biological father must consent to the adoption so long as he responds to notice of the adoption); WASH. REV. CODE § 26-33.160(1)(b) (biological father must consent to an adoption absent termination of his parental rights).

[10] In any event, as respondent Father argues (Br. 26-27), even had Congress intended to incorporate state law, there is no reason to believe Congress intended to incorporate state substantive law regarding adoption, rather than state law governing the establishment of paternity, given that the

Instead, the child welfare standards embodied in ICWA enforce the best child welfare practices of transparency, stability, and supporting, developing, maintaining, and preserving the relationships between children and their loving and fit birth parents, up until the moment that those birth relationships are permanently severed and a new family is created. The South Carolina Supreme Court found no reason to permanently sever Baby Girl's ties to Father because "he and his family have created a safe, loving, and appropriate home for her." Pet. App. 32a. That judgment is not only consistent with ICWA's mandates for Indian children, but with best practices for all children.

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definition of "parent" in ICWA applies across every kind of child welfare proceeding, not just adoption. State laws distinct from adoption-consent statutes address how "paternity" may be "acknowledged" or "established," and application of South Carolina paternity law would comport with the judgment in this case. *See, e.g.*, S.C. CODE ANN. Regs. § 63-17-10(C) ("action to establish the paternity of an individual").

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

Casey Family Programs is the nation's largest operating foundation focused entirely on foster care and improving the child welfare system. Casey Family Programs has provided direct family services to children and families involved in public and tribal foster care systems for more than forty years. It also works to improve the child welfare system by consulting with child welfare agencies and providing research and education to policymakers about best practices in the child welfare area. The Indian Child Welfare Act both embodies and has served as a model for child welfare principles and policies that are critical to Casey Family Programs' work.

Established in 1920, the Child Welfare League of America ("CWLA") is the nation's oldest and largest membership-based child welfare organization. CWLA is a coalition of public and private agencies serving vulnerable children and families, including those in tribal communities, by advancing standards of excellence, accreditation, and the best research-based practices with respect to child welfare work. In particular, CWLA is recognized nationally as the standard-setter for child welfare services and publishes thirteen "Standards of Excellence" as a means to achieve professionalism and uniformity in the administration of child welfare services, including in particular Standards of Excellence for Adoption Services. CWLA adheres to and supports ICWA in its Standards of Excellence. CWLA's Standards also influence and improve child welfare practices throughout North America, as well as informing the Standards of Accreditation for agency administration,

management, and service delivery for accredited child welfare agencies.

The Children's Defense Fund ("CDF") is a non-profit child advocacy organization that has worked relentlessly for four decades to ensure a level playing field for all children. CDF champions policies, programs and practices that lift children out of poverty, ensure their access to health care, offer them quality early childhood experiences and a quality education, protect children from abuse, neglect, and delinquency, and keep children safely out of foster care and the juvenile justice system. CDF provides a strong voice for all children and pays particular attention to the needs of poor children, minority children, and children with disabilities. One of CDF's earliest reports, *Children Without Homes: An Examination of Public Responsibility to Children in Out of Home Care*, identified, among other findings, a pervasive, implicit anti-family bias that often shapes decisions about children at risk of removal from their families or in out-of-home care. CDF works collaboratively at the federal, state and local levels to achieve policy and practice reforms to help keep these children safely with their families, and only when that is not possible, to place them in foster care. Even then, CDF strives (i) to ensure that foster care is provided in the most family-like setting and within reasonable proximity to their biological families and community, (ii) to seek safe reunification with the support of needed services for the child and the parents in a timely fashion, and (iii) only when reunification is not appropriate, to move children promptly to new permanent families through adoption or kinship guardianship.

The Donaldson Adoption Institute is a national not-for-profit organization whose mission is to provide leadership that improves adoption laws, policies, and practices in order to better the lives of everyone touched by adoption. To achieve those goals, the Institute conducts and synthesizes research, offers education to inform public opinion, promotes ethical practices and legal reforms, and works to translate policy into action.

The North American Council on Adoptable Children ("NACAC") was founded in 1974 by adoptive parents to meet the needs of children waiting for permanent families and the families who adopt them. NACAC promotes and supports permanent families for children and youth in the United States and Canada who are in state care, especially those in foster care and those who have special needs. Dedicated to the belief that every child deserves a permanent, loving family, NACAC's activities include advocacy, parent leadership development, adoption support, and education and information sharing. NACAC produces conferences, position statements, articles, and publications highlighting best practices in child welfare and adoption. NACAC fully supports ICWA and several of its position statements highlight the practices codified in ICWA as best practices for all children and youth.

Voice for Adoption (VFA) is a membership advocacy organization with a network of grassroots adoption and child welfare advocates throughout the country. VFA develops and advocates for improved adoption policies, and its members recruit and support adoptive families. Recognized as a national leader in special-needs adoption, VFA works closely

with federal and state legislators to make a difference in the lives of the 104,000 children in foster care who are waiting to be adopted and the families who adopt children from foster care. Voice for Adoption is concerned about preserving best practices for children as outlined in ICWA.

The Annie E. Casey Foundation is a private charitable organization dedicated to improving the well-being of our nation's most vulnerable children. The Foundation collaborates with public agencies, nonprofit organizations, policymakers and community leaders to develop innovative, cost-effective solutions for challenging social problems. For more than 60 years, the Foundation has supported programs and initiatives to secure and sustain lifelong family connections for children and youth in foster care, and for 36 years, the Foundation provided direct foster care and related child welfare services in New England and Maryland. This work, along with the Foundation's system improvement initiatives, direct consulting work with numerous public child welfare agencies, and grantmaking, have contributed to significant and measurable transformations in these systems and helped to improve outcomes for children and their families. Federal policies such as the Indian Child Welfare Act set substantive and procedural standards that are central to the Foundation's goal of ensuring that child welfare systems operate effectively and efficiently to strengthen families.

Black Administrators in Child Welfare, Inc. ("BACW") is the nation's oldest member organization devoted to ensuring that the racial, ethnic and cultural experiences of Black children and families

are recognized, understood and served by child welfare agencies. BACW's membership consists of individuals and agencies, both public and private, that provide services to all children and families engaged in the child welfare system. Since its inception in 1972, BACW has advanced best practices in child welfare with an intentional focus on meeting the unique needs of American children of African heritage. BACW advocates, conducts research, and publishes resources to further its mission. Over the past forty years, BACW has refined its role to emphasize the autonomy and integrity of safe families, including birth families, extended kin and adoptive homes in communities of color. BACW supports both the letter and the spirit of the Indian Child Welfare Act in its role to preserve families of Native American heritage. BACW is an inclusive organization that collaborates with persons, organizations and governmental units that share its vision of eradicating racial, ethnic, cultural and social bias in the child welfare system.

The Children and Family Justice Center ("CFJC") is a comprehensive children's law center that has represented young people in conflict with the law and advocated for policy change for over 20 years. The CFJC is committed to keeping children with their families absent a compelling state interest justifying their removal. In addition to its direct representation of youth and families in matters relating to delinquency and crime, immigration or asylum, and fair sentencing practices, the CFJC also collaborates with community members and other advocacy organizations to develop fair and effective strategies for systemic reform.

The Chicago-based Family Defense Center is the first-of-its-kind, independent legal advocacy organization addressing the fundamental right of families to remain together or to reunite in the face of intervention by state and local child protection agencies. The Center's mission is to advocate for justice for families in the child welfare system. The Center has become a nationally recognized leader for its award-winning legal services program encompassing direct legal services, education and training, and systemic advocacy. The Center serves parents, youth, family members, and child care workers of all ages, races, genders, sexual orientations, and income levels, and it represents many disadvantaged and minority parents, including Native American parents who, but for the Center's willingness to assist them, would lack resources to mount a challenge to government and private actions that curtail their access to their children. Based on its experience representing these parents, the Center endorses the importance of maintaining the protections of the Indian Child Welfare Act as a best practice in the child welfare field.

The First Focus Campaign for Children is a bipartisan organization advocating for legislative change in Congress to ensure children and families are a priority in federal policy and budget decisions. The organization is dedicated to the long-term goal of substantially reducing the number of children entering foster care, and working to ensure that the existing system of care protects children and adequately meets the needs of families in the child welfare system. First Focus is especially concerned with increasing federal investment in prevention

efforts and providing support and services for at-risk families to ensure that they avoid entering the child welfare system in the first place. First Focus fully supports the Indian Child Welfare Act, and views it as a model for child welfare principles and policies in the field.

Foster Care Alumni of America ("FCAA"), a national organization of alumni of the foster care system, was formed in 2000. Its vision is to ensure a high quality of life for those in and from foster care through the collective voice of alumni. FCAA hopes to erase the differences in opportunities and outcomes that exist for people in and from foster care compared to those who have not experienced foster care. FCAA also believes that alumni of foster care possess an expertise about foster care that is not available anywhere else. Alumni's experiences have taught that, when best practices, standards and laws like those embodied in ICWA are not followed, the lives of children in foster care can be drastically affected, in some cases allowing children to linger in the foster care system until they age out. Upon leaving foster care, children may no longer have any connection to their birth family, and may also lack alternative permanent connections that could help and support them. FCAA supports ICWA and other policies, practices, and laws that ensure that young people in foster care are afforded the best opportunity to grow and lead successful lives.

FosterClub is the national network of young people in foster care. FosterClub's mission is to lead the efforts of young people in and from foster care to become connected, educated, inspired and represented so that they can realize their personal

potential and contribute to a better life for their peers. For over a decade, FosterClub has provided foster youth a place to turn for advice, information and hope. With over 32,000 members, FosterClub elevates the collective voice of young people who have experienced foster care, including Native American youth involved with the child welfare system. FosterClub's young leaders engage and inform policymakers, practitioners, and the public about the critical needs of children and youth through first-hand stories about what life is like in the foster care system.

The National Alliance of Children's Trust and Prevention Funds is a national leader in preventing child abuse and neglect and strengthening families. Its mission includes efforts to promote and support a system of services, laws, practices and attitudes that supports families by enabling them to provide their children with safe, healthy, and nurturing childhoods. It is the only national organization that supports all aspects of the work of state children's trust and prevention funds, which are special funds established in state law, funded by a variety of state revenue sources or donations, and dedicated to child welfare programs. The Alliance provides training, technical assistance, and publications that support effective child welfare practices throughout the Country, including a 14-hour online training in how to help families build protective factors that have been shown to increase the health and well-being of children and families.

The National Association of Public Child Welfare Administrators ("NAPCWA") is an affiliate of the American Public Human Services Association,

established in 1983 to represent the nation's public child welfare administrators. Its membership includes executives from state and local public agencies, the territories, and the District of Columbia. NAPCWA's mission is to pursue excellence in public child welfare by supporting state and local leaders, informing policymakers, and working with its partners to drive innovative, effective, and efficient approaches that promote child, youth, and family well being. Its policy work is guided by its approach to translating and disseminating new knowledge and best practices on the administration and delivery of child welfare services, including the Indian Child Welfare Act (ICWA). NAPCWA is regarded as a national leader in programs and policies to prevent children from coming into care in the first place, and to find alternative solutions for parents to safely parent and nurture their children in their own homes. NAPCWA supports ICWA practices.

The National Association of Social Workers ("NASW") is the largest professional membership organization of social workers in the world, representing 140,000 social workers, with chapters located in all fifty states, the District of Columbia, the Virgin Islands, Guam, and Puerto Rico. Since its inception in 1955, NASW has worked to develop and maintain high standards of professional practice, to advance sound social work policies, and to strengthen and unify the social work profession. Its activities include promulgating professional standards, enforcing the *NASW Code of Ethics*, conducting research and publishing materials relevant to the profession, and providing continuing education.

NASW offers specialty credentials for social workers such as the Certified Advanced Children, Youth, and Family Social Worker (C-ACYFSW) and the Certified Children, Youth, and Family Social Worker (C-CYFSW), and it publishes the *NASW Standards for Social Work Practice in Child Welfare*. NASW's policy statement, Foster Care and Adoption, supports "a child welfare policy designed to provide the best care for all children ***, permanency for children involved in the child welfare system ***, respect for the civil rights of parents and children, regardless of their race, ethnicity, language, capabilities, religion, sexual orientation, gender identity, geographic location, or socioeconomic status ***, a transparent system ***," and "efforts to maintain a child's identity and his or her ethnic heritage in all services and placement actions." SOCIAL WORK SPEAKS 148, 151-152 (NASW, 2012, 9th ed.).

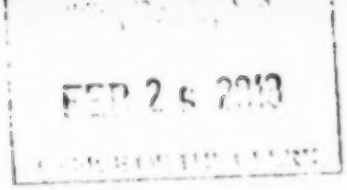
The National Court Appointed Special Advocate Association ("National CASA") is the national membership organization for over 950 state and local CASA and volunteer guardian ad litem programs. Its mission is to support court-appointed volunteer advocacy so that every abused or neglected child can be safe, establish permanence, and have the opportunity to thrive. CASA and guardian ad litem volunteers have advocated for the best interests of over two million children involved in both state and tribal courts due to abuse or neglect. The National CASA Association believes that adherence to the provisions of the Indian Child Welfare Act is always in the best interests of a child involved in any dependency proceeding. For that reason, all CASA and guardian ad litem advocates receive training in

how to monitor compliance with the Act and ensure that the child's cultural and familial needs are fully considered by the court.

The National Crittenton Foundation ("TNCF") was established in 1883 and is the umbrella organization for 27 agencies providing youth services in 31 States and the District of Columbia. Agencies provide a range of services to girls, young women, and families involved with the child welfare system. For more than a century, Crittenton agencies have been deeply committed to meeting the needs of children for safe, nurturing and stable homes and relationships. TNCF and Crittenton agencies depend on ICWA to guide this work in a way that respects and honors tribal affiliation and heritage while ensuring the lifelong well being of children in the child welfare system.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS



No. 12-399

IN THE
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ Of Certiorari
To The Supreme Court of South Carolina

BRIEF OF CHILD ADVOCACY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF BABY GIRL SUPPORTING REVERSAL

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QUESTIONS PRESENTED

Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

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BRIEF OF CHILD ADVOCACY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF BABY GIRL

INTEREST OF *AMICI CURIAE*[1]

A. The Barton Child Law & Policy Center is a clinical program of Emory Law School dedicated to promoting and protecting the legal rights and interests of children involved with the juvenile court, child welfare, and juvenile justice systems in Georgia. The Center achieves its reform objectives through research-based policy development, legislative advocacy, and holistic legal representation for individual clients. The Barton Center's children's rights agenda is based on the belief that policy and law should be informed by research and that legal service to children and families needs to be holistic. The premise behind representing the "whole" child exists at the core of the Barton Center's mission and our approach to student instruction. That basis recognizes that children should be viewed in their social and familial contexts and provided with individualized services to protect their legal rights, respond to their human needs, and ameliorate the social conditions that create risk. The Barton Center adopts an interdisciplinary, collaborative approach to achieving justice for youth.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

B. The Child Rights Project (CRP) is a project of Emory Law School engaging students in researching and writing of friend of the court briefs in cases of importance to children and youth. Its mission is to highlight for the judiciary and the public the often unanticipated impact of court decisions on children and youth. The CRP's goal is to train new generations of lawyers in multidisciplinary research and advocacy. The CRP collaborates with distinguished law firms to provide pro bono representation to an underserved population. Leadership of the CRP has over 25 years of experience in appellate advocacy on behalf of children and youth.

C. Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well-being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies, such as abused and neglected children who are separated from their families and placed in foster care. JLC works to ensure that the rights of children are respected and supported and that they are treated fairly by the systems that are supposed to help them. Since its founding, Juvenile Law Center has represented hundreds of abused and neglected children in child welfare proceedings and played a prominent role in ensuring that children in Pennsylvania have access to counsel at all stages of dependency and child welfare proceedings, including termination of parental rights. Juvenile Law Center's work is guided by the view that children have a constitutional right to counsel in all matters where the state is restricting their liberty or altering the familial relationships that are central to the future well-being of the child and that children have a lib-

erty interest in the establishment and maintenance of familial relationships.

D. The Center on Children and Families (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an organization whose mission is to promote the highest quality teaching, research, and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinics and Gator TeamChild juvenile law clinic.

SUMMARY OF ARGUMENT

In the decision under review in this case, the South Carolina Supreme Court determined that it had no choice but to take two-year old Baby Girl away from the adoptive parents ("Adoptive Couple") who had raised her since infancy and transfer her to the custody of a biological father ("Father") whom she had never met. That decision violated Baby Girl's constitutional right to a custody decision that takes full and balanced account of all the factors that affect her best interests.

When Father expressly rejected any paternal rights or duties, the pregnant birth mother ("Mother") decided on adoption. More than two years passed between Baby Girl's placement at birth and the custody hearing. Many mistakes, misunder-

standings and poor choices by adults resulted in this long delay. But Baby Girl is indisputably blameless. It is not her fault that she bonded with Adoptive Couple or that she lacked contact with Father. Those facts simply reflected her reality at the time of the custody hearing, and she was entitled to have that reality taken into account. It was not.

The state supreme court recognized that "Adoptive Couple are ideal parents who have exhibited the ability to provide a loving family environment for Baby Girl." Pet. App. 40a. And it acknowledged the "emotional bonding" that had occurred between Baby Girl and Adoptive Parents—"a normal and desirable outcome when, as here, a child lives with a foster family for several years." *Id.* at 39a. Nevertheless, the court held that the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.* ("ICWA"), required it to remove Baby Girl from her home and family without full consideration of her best interests. As the court explained its holding: "[T]he dictates of federal Indian law supersede [the best interests of the child standard] where the adoption and custody of an Indian child is at issue." Pet. App. 40a; *see also id.* at 39a (""The best interests of the child is an improper test to use in ICWA cases.'") (quoting *In re C.H.*, 997 P.2d 776, 784 (Mont. 2000)) (alterations omitted).

"Because this case involves an Indian child," the court concluded, "the ICWA applies and confers conclusive custodial preference to the Indian parent. *All of the rest of our determinations flow from this reality.*" Pet. App. 40a (emphasis added).

ICWA was never intended to create a conclusive presumption in favor of the Indian parent or Indian tribe that overrides all other factors affecting the best interests of the child—an outcome that would

violate children's constitutional right to a hearing that recognizes and gives proper weight to all of their rights and interests. ICWA must be interpreted to allow consideration of Baby Girl's constitutional right to continuity and stability of her developed family relationships, in addition to considering the importance of preserving ties with her Indian heritage.

ARGUMENT

I. CHILDREN HAVE A CONSTITUTIONAL RIGHT TO CONSIDERATION OF THEIR DEVELOPED FAMILY RELATIONSHIPS.

A. It is well settled that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976); *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). This Court has repeatedly endorsed that principle, holding that many of the fundamental rights enshrined in our Constitution apply with equal measure to both children and adults. *See, e.g., Bellotti v. Baird*, 443 U.S. 622, 648 (1979) (plurality opinion) (right to privacy); *Danforth*, 428 U.S. at 74-75 (same); *In re Winship*, 397 U.S. 358, 368 (1970) (right to proof beyond a reasonable doubt); *In re Gault*, 387 U.S. 1, 35-37, 55 (1967) (rights to legal counsel and against self-incrimination). Even where children's constitutional rights differ in scope from their adult counterparts, the Court has underscored that any such difference must be attributable to the state's "general interest in the youth's well being." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

It is equally well settled that parents have a constitutional liberty interest in raising their children. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)

("[L]iberty . . . denotes . . . the right of the individual to . . . establish a home and bring up children."). This Court has consistently recognized the constitutional significance of parents' interest in maintaining continuing ties to, and custody over, the children in their care. *See Lehr v. Robertson*, 463 U.S. 248, 256 (1983) ("The intangible fibers that connect parent and child . . . are sufficiently vital to merit constitutional protection in appropriate cases."). Such recognition rests upon "the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion).

Thus, in *Stanley v. Illinois*, this Court protected a biological father's interest in maintaining custody over the illegitimate children he had raised. 405 U.S. 645, 657-58 (1972). And in *Caban v. Mohammed*, the Court protected a biological father's right to prevent the adoption of his illegitimate children, where he had supported the children and maintained contact with them. 441 U.S. 380, 394 (1979).

Further, this Court has suggested that constitutional protection for parent-child relationships may extend beyond biological parents, to other parental figures in the child's life. As the Court remarked in *Smith v. Organization of Foster Families for Equality & Reform*, "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association." 431 U.S. 816, 844 (1977); *see also Troxel v. Granville*, 530 U.S. 57, 98 (2000) (Kennedy, J., dissenting) ("Cases are sure to arise—perhaps a substantial number of cases—in which a third party, by acting in a caregiving role over a significant period of time, has developed a

relationship with a child which is not necessarily subject to absolute parental veto."); *Michael H.*, 491 U.S. at 127-29 (plurality opinion) (noting that family is not necessarily based on biological ties). Even where the parent-child relationship does not resemble a "traditional" nuclear family, the Constitution provides important guarantees that the existing family unit will not be disturbed. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977) (plurality opinion) (protecting relationships with extended family members).

In fact, this Court has held on more than one occasion that continuity of existing familial relationships—whether biological or not—is more important than the protection of purely biological ties. *See Astrue v. Capato*, 132 S. Ct. 2021, 2030 (2012) ("[A] biological parent is not necessarily a child's parent under law."). Thus, where a biological father has never sought actual or legal custody of a child, he may be prevented from blocking an adoption. In *Lehr*, for example, the Court rejected the claim of an unwed biological father that his due process rights had been violated when he was not notified of his child's adoption. *See* 463 U.S. at 250. Because the father had failed to "accept some measure of responsibility for the child's future," the "Federal Constitution [did] not automatically compel a State to listen to his opinion of where the child's best interests lie." *Id.* at 262. In *Quilloin v. Walcott*, an unwed father was prevented from vetoing the adoption of his biological child. 434 U.S. 246, 248-49 (1978). The father had provided support to the child "only on an irregular basis," and "had never been a *de facto* member of the child's family unit." *Id.* at 251, 253. The Court therefore held that the State was not "required in this situation to find anything more than

that the adoption, and denial of legitimation, were in the 'best interests of the child.'" *Id.* at 255.

The Court has not yet had the occasion, however, to recognize a *child's* constitutional liberty interest in maintaining those same, developed relationships with his or her established primary caregivers. *See Michael H.*, 491 U.S. at 130 (plurality opinion) ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship."). The Court has only implied that such a right exists. *See Smith*, 431 U.S. at 842 n.45 ("There can be, of course, no doubt of appellees' standing to assert [a liberty] interest, which, to whatever extent it exists, belongs to the foster parents *as much as to the foster children.*") (emphasis added); *Stanley*, 405 U.S. at 645 (noting that presumption of parental unfitness "risks running roughshod over the important interest of both parent *and child*" and is therefore unconstitutional) (emphasis added). As Justice Stevens has elaborated, "[w]hile this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation." *Troxel*, 530 U.S. at 88 (Stevens, J., dissenting) (citation omitted).

B. A child has a constitutional right to protection of his or her parental relationships, especially where (as was the case here) the parents are loving and supportive and have been the child's only caregivers since birth.

Experts in the fields of psychology and child development have long recognized that a strong bond—an "attachment"—develops between young children and their caregivers. *See* Jude Cassidy & Phillip R. Shaver, *Handbook of Attachment: Theory, Research, and Clinical Applications* (2d ed. 2010); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-20 (1984) ("Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."). Because it "has important implications for children's early affective experience," "attachment to a caregiver is a major part of children's early social lives." William Damon, *Social and Personality Development: Infancy Through Adolescence* 41 (1983). Furthermore, "the quality of children's attachment to their caregivers is linked with their propensity to explore the world around them, including other persons in that world." *Id.* These bonds of attachment are just as powerful for children of adoptive parents as they are for children of biological parents. *See* Leslie M. Singer et al., *Mother-Infant Attachment in Adoptive Families*, 56 Child Dev. 1543, 1547, 1550 (1985) ("Like nonadoptive mother-infant pairs, most adoptive mothers and their infants develop warm and secure attachment relationships.").

Experts agree that children benefit immensely from the continuity of their attachments. Leah Matas et al., *Continuity of Adaptation in the Second Year: The Relationship Between Quality of Attachment and Later Competence*, 49 Child Dev. 547, 553 (1978) ("Subjects classified as securely attached in infancy . . . were significantly more enthusiastic, affectively positive, and persistent; they exhibited less

nontask behavior, ignoring of mother, and noncompliance."). In fact, "[s]ignificant disruptions in children's relationships with their primary caregivers can present developmental challenges for children." Lois A. Weithorn, *Developmental Neuroscience, Children's Relationships with Primary Caregivers, and Child Protection Policy Reform*, 63 Hastings L.J. 1487, 1531 (2012) (collecting expert sources); *see also* 1 John Bowlby, *Attachment and Loss* (2d ed. 1982); Damon, *supra*, at 41-48.

Experts also agree that the severing of attachment relationships poses severe and lifelong risks to an individual's health and welfare. *See* National Scientific Council on the Developing Child, *The Science of Early Childhood Development: Closing the Gap Between What We Know and What We Do* 6 (2007) ("[S]table, responsive relationships build healthy brain architecture that provides a strong foundation for lifelong learning, behavior and health."); Bruce D. Perry, *Examining Child Maltreatment Through a Neurodevelopmental Lens: Clinical Applications of the Neurosequential Model of Therapeutics*, 14 J. Loss & Trauma 240, 246 (2009) ("If the caregiver is . . . inconsistent, or absent, [stress response and relational networks] develop abnormally."); Centers for Disease Control and Prevention, *Adverse Childhood Experiences (ACE) Study: Major Findings*, http://www.cdc.gov/ace/findings.htm (Jan. 18, 2013) (finding correlation between adverse childhood experiences and, *inter alia*, alcohol and drug abuse, heart disease, liver disease and suicide attempts). Severing a young child's attachment relationship makes the child more likely to suffer long-term medical problems and mental health issues, including psychological and physiological distress, emotional dysregulation, loss of appetite, sleep deprivation, and

behavioral problems. Damon, *supra*, at 41-48; Myron A. Hofer, *Psychobiological Roots of Early Attachment*, 15 Current Directions Psychol. Sci. 84, 85-86 (2006).[2] Such separation from a childhood caregiver may even affect a child's capacity to form healthy relationships later in life. *See* Bruce D. Perry, *Childhood Experience and the Expression of Genetic Potential: What Childhood Neglect Tells Us About Nature and Nurture*, 3 Brain and Mind 79, 95 (2002).

It bears noting that adoption poses challenges of its own. Even in the most successful adoptions, adoptees may yearn to know their birth families, cultures, and traditions. *See* David M. Brodzinsky, *Long Term Outcomes in Adoption*, 3 Future of Children 153 (1993); Solangel Maldonado, *Permanency v. Biology, Making the Case for Post-Adoption Contact*, 37 Cap. U. L. Rev. 321 (2008).

For those reasons, the "best interests of the child" standard has served as the pole star in adoption decisions, in most cases ensuring that the welfare of the child remains the central focus of courts' concern. *See* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & Fam. Stud. 337, 347-48 (2008); *see also, e.g., In re Baby Boy C.*, 581 A.2d 1141, 1144 (D.C. 1990) (per curiam) (a presumptively fit father's right to veto a proposed adoption may nonetheless be overcome by clear and convincing evidence that it is in the best interest of the minor for the adoption to proceed); *Sorentino v. Family & Children's Soc'y of Elizabeth*, 367 A.2d 1168,

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[2] *See also, e.g.*, Ross A. Thompson & Mary Fran Flood, *Toward a Child-Oriented Child Protection System, in Toward a Child-Centered Neighborhood Based Child Protection System* 155, 169-170 (Gary B. Melton et al. eds., 2002).

1171 (N.J. 1976) (per curiam) (because the child had been in the custody of the adoptive parents for over two and a half years, the adoptive parents were entitled to a hearing on "whether transferring the custody of the child to plaintiffs . . . will raise the probability of serious harm to the child"). A number of state courts have recognized that children, as much as adults, possess a constitutional right to maintain fundamental family relationships. For example, the California Court of Appeal has held that "the rights of children in their family relationships are at least as fundamental and compelling as those of their parents. *If anything, children's familial rights are more compelling.*" *In re Bridget R.*, 41 Cal. App. 4th 1483, 1504 (1996) (emphasis added); *see also In re Jasmon O.*, 878 P.2d 1297, 1307 (Cal. 1994) (child's interest in stability with foster family outweighed biological parent's interest because "[c]hildren, too, have fundamental rights"). The Michigan Supreme Court has held that the "*mutual* rights and obligations" of parent and child constitute a "fundamental human relationship" under the due process clause. *Reist v. Bay Cnty. Circuit Judge*, 241 N.W.2d 55, 62 (Mich. 1976) (emphasis added); *see also Hiller v. Fausey*, 904 A.2d 875, 891 (Pa. 2006) (Newman, J., concurring) ("Security, continuity, and stability in an ongoing custodial relationship, whether maintained with a biologic or adoptive parent and/or with a grandparent is vital to the successful personality development of a child."); Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 Cap. U. L. Rev. 297, 316 (2005) (adoption is "a fundamental family relationship").

Although this Court has not yet expressly reached that conclusion, it "has long recognized that, because the Bill of Rights is designed to secure indi-

vidual liberty, it must afford the formation *and preservation* of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts*, 468 U.S. at 618 (emphasis added). To a two-year-old child, there could be no liberty interest more important—more deserving of this Court's protection under the Constitution—than her interest in maintaining an enduring and stable relationship with the only parents she has ever known. *See* Carol George, et al., *Incorporating Attachment Assessment into Custody Evaluations: The Case of a 2-Year Old and Her Parents*, 49 Fam. Ct. Rev. 483, 483 (2011) ("Children under the age of five, whose developmental capacities are limited, may be especially vulnerable in separation and custody decisions.") (citation omitted).

C. By recognizing that a child's right to a stable and supportive family environment rises to a constitutional level, this Court would help to ensure that a child's best interests are properly analyzed and balanced against any other rights that may be at stake. Courts, like the court below, would no longer feel "constrained," Pet. App. 40a, to ignore the child's emotional and developmental needs in applying the provisions of ICWA.

There are competing rights and interests at stake in any contested adoption under ICWA and, as with the interests of the child, the strength and weight of adults' interests may vary according to the facts of a case. This Court has already determined that the strength of an unmarried biological father's interest depends on whether he has established an "actual relationship of parental responsibility" with the child. *Lehr*, 463 U.S. at 260. Although a State normally must give "special weight" to a biological

parent's wishes, *Troxel*, 530 U.S. at 69 (plurality opinion), it need not defer to the preferences of an unwed biological father who failed to establish an actual relationship with his child before her adoption. *See Lehr*, 463 U.S. at 262; *Quilloin*, 434 U.S. at 255.

In applying ICWA, this Court has determined that the strength of an Indian tribe's interest in a child's custodial determination is premised on the "semi-independent position" of Indian tribes and their "power [to] regulat[e] their internal and social relations." *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164, 173 (1973) (internal quotation marks omitted). Because tribal sovereignty "centers on the land held by the tribe and on tribal members within the reservation," *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008), the tribe's interests under ICWA are at their apex where an adoption threatens to *remove* an Indian child from her Indian family—especially where that family is living on Indian lands. *See* 25 U.S.C. § 1901(4) (ICWA addresses the "alarmingly high percentage of Indian families" being "broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies"); *see also id.* § 1912(f) (focusing on "the *continued* custody of the [Indian] child by the [Indian] parent" (emphasis added)).

In such cases, ICWA grants tribal courts exclusive jurisdiction over the adoption "to preserve tribal sovereignty over the domestic relations of tribe members." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 58 (1989) (Stevens, J., dissenting); *see also* 25 U.S.C. § 1911(a). *Amici* are well aware of the tragic history that gave rise to ICWA and they recognize that ICWA plays a valuable role in preserving the rights of children of Indian ancestry to

protection of their Indian families, tribes, and traditions. Where a tribe's connection to the child is extremely attenuated, however, the tribe's interests under ICWA are also diminished and may not trump the constitutional rights of the child to a decision that is in her best interests.

II. Baby Girl's Constitutional Rights Were Not Given Full And Fair Consideration.

In this case, the South Carolina Supreme Court improperly allowed the interests of biological Father and the tribe to preclude an honest assessment of Baby Girl's best interests—particularly her constitutional right to a stable, supportive family environment and the continuity of her developed relationship with her adoptive parents. This Court should rectify this error by holding that ICWA does not create a conclusive presumption and that Baby Girl's constitutional right to protection of her developed family relationships should not have been trumped by the diminished rights of the Father or the tribe in this case.

Baby Girl had a constitutionally significant interest in preservation of the "loving family environment" and emotional security provided by Adoptive Couple, who had raised her since infancy. Pet. App. 40a. Adoptive Couple began caring for Baby Girl even before she was born, providing financial assistance and emotional support to Mother during the final months of her pregnancy. *Id.* at 5a. Adoptive Couple provided her with a "loving, nurturing, and stable home." *Id.* at 72a (Kittredge, J., dissenting) ("The evidence of their parental fitness is overwhelming."). Most importantly, an "expert in familial bonding who conducted a bonding evaluation of [Adoptive

Couple] and Baby Girl" testified that "he believed *beyond a reasonable doubt* that the removal of Baby Girl from [Adoptive Couple's] care would cause serious emotional harm." *Id.* at 74a, 76a (emphasis added).

Under this Court's precedents, Father's interest in preventing Baby Girl's adoption was particularly weak. It is "undisputed" that Father never lived with Mother when she was pregnant with Baby Girl; he refused to support Mother financially in any way, "even though he had the ability to provide some degree of financial assistance to Mother"; he "did not make any meaningful attempts to contact [Mother]," let alone provide her with emotional support, for at least five months prior to Baby Girl's birth; and he "made no attempt to contact or support Mother directly in the months following Baby Girl's birth," even though he "was aware of Mother's expected due date." Pet. App. 4a, 8a. In fact, it is uncontroverted that when Mother asked for financial assistance during her pregnancy, Father sent her a text message explicitly relinquishing his parental rights. *Id.* at 4a; *see also id.* at 44-45a (Kittredge, J., dissenting) ("At trial, Father was asked, 'But [Mother] had to marry you before you felt you'd be responsible as a father?' He answered, 'Correct.'"). At trial, Father admitted that he *still* would have "sign[ed] all [his] rights and responsibilities away to [Baby Girl] just so as long as the mother was taking care of [her]." *Id.* at 46a (Kittredge, J., dissenting).

In line with this Court's precedents, South Carolina law precludes an unwed father from vetoing an adoption unless he has "openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption" or has "paid a fair and reasonable

sum . . . for support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child"—neither of which Father did. S.C. Code § 63-9-310(A)(5); *see also* Pet. App. 24a (recognizing Father's lack of parental rights under South Carolina law).[3]

Although ICWA properly protects the interests of tribes in preserving Indian families, the Cherokee Nation's interest is particularly weak in this case. This is not an archetypal ICWA case, in which non-Indian persons are seeking to remove a child from Indian custody and Indian lands. *See* H.R. Rep. No. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531 (ICWA is intended to address both "the trauma of separation [of Indian children] from their families" and the "problems of adjusting to a social and cultural environment much different from their own"); *see also Holyfield*, 490 U.S. at 36 (describing "the heart of the ICWA"). Both Baby Girl and Father have only tenuous ties to the tribe. Before this litigation began, Baby Girl—whose Mother is Hispanic, not Indian—had never spent any time with her Indian father or on Indian land. *See* Pet. App. 7a. And Father himself does not reside and has apparently never resided on Indian land. *See* GAL Br. 10. Of course, even a child who has never visited tribal lands can still be raised to identify with Indian cul-

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[3] *Accord* Ala. Code § 26-10A-7(a)(3); Alaska Stat. § 25.23.040(a)(2); Ariz. Rev. Stat. § 8-106(A)(2); Ark. Code § 9-9-206(a)(2); Cal. Fam. Code § 8605; Fla. Stat. § 63.062(1)(b); Haw. Rev. Stat. § 578-2(a)(5); Idaho Code § 16-1504(2)(b); 750 Ill. Comp. Stat. 50/8(b)(1)(B); Mass. Ann. Laws ch. 210, § 2; Miss. Code § 93-17-5(3); Mo. Rev. Stat. § 453.030; Mont. Code § 42-2-301; N.Y. Dom. Rel. Law § 111(e); N.C. Gen. Stat. § 48-3-601(2)(b); Okla. Stat. tit. 10, § 7505-4.2(C)(1); 23 Pa. Cons. Stat. § 2511(a)(6); Utah Code § 78B-6-121.

ture and traditions. But by disclaiming any responsibility for Baby Girl before she was born, Father sacrificed his opportunity to raise Baby Girl in the Indian culture.[4]

Under the facts of this case, ICWA's statutory priorities should not have trumped Baby Girl's constitutional right to a custody decision guided by her best interests. *See* U.S. Const. art. VI, cl. 2. To ignore or undervalue the bonds that Baby Girl developed with her Adoptive Parents—as the state supreme court did—inflicted substantial and irreparable harm on her, denying her the "dignity owed to individual persons." Barbara Bennett Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 Fam. L. Q. 105, 18 (2002). The decision below reflects an abdication of the court's responsibility to be ever vigilant in protecting the interests of the most vulnerable members of our society—young children—and to place their emotional and developmental needs first. *See* Leigh Goodmark, *From Property to Personhood: What the Legal System Should do for Children in Family Violence Cases*, 102 W. Va. L. Rev. 237, 252 (1999) ("[Custody] [d]ecisions . . . more frequently tend to reflect the interests and desires of the parents, reinforcing the sense that children are essentially chattel."); Diane I. Bonina & Ruth A. Baha-Jachna, *The Treatment of Children as Chattel in Recent Adoption Decisions*, 26 Hum. Rts. 2, 6 (1999) ("Until courts stop treating children as chattel and begin to recognize and give meaningful consideration to the rights of children . . ., children . . . will continue to be the

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[4] Moreover, the dissenters below recognized Adoptive Couple's "dedication to exposing the child to her Indian heritage." Pet. App. 100a (Kittredge, J., dissenting).

innocent victims of our judicial system."). Baby Girl was removed from her bonded caregivers without any apparent consideration of her needs for support during the period of transition and acclimatization. *See* GAL Br. 23-24 ("It is the Guardian's understanding that Birth Father allowed Baby Girl to speak with Adoptive Couple by telephone [on the day after custody was transferred], and then cut off all communication between them.").

By far the best practice in contested adoption cases, under ICWA or any other adoption statute, is a speedy, accurate and final resolution. Children cannot be placed in escrow while adults litigate their competing claims. Courts should instead take steps to ensure that their established family relationships, whether biological or adoptive, are protected and respected. If a change of custody must occur after a child has bonded with her caregivers, it should be accomplished with sensitivity to the emotional and developmental needs of the child. The best interests of the child demand no less from courts that decide their destinies. *Amici* urge this Court to bear in mind the constitutional rights of the child who is the subject of this dispute and interpret ICWA to allow a full and fair consideration those rights.

CONCLUSION

The judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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ADOPTIVE COUPLE,
Petitioners,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF *AMICUS CURIAE* CHRISTIAN ALLIANCE FOR INDIAN CHILD WELFARE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Christian Alliance for Indian Child Welfare ("Alliance") is a Montana nonprofit corporation with approximately 400 members in 35 states, including South Carolina. Alliance was formed, in part, to: (1) promote human rights for all United States citizens and residents; (2) educate the public about Indian rights, laws, and issues; and (3) encourage accountability of governments, particularly the federal government, to families with Indian ancestry.

Alliance seeks to help and protect the human, civil, and constitutional rights of all Americans, especially those of Native American ancestry, through education, outreach, and legal defense. One area of constitutional concern is the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 ("ICWA").

Alliance is particularly concerned for families with members of Indian ancestry who have been denied the full range of rights and protections of federal and state constitutions when subjected to tribal jurisdiction. Alliance is interested in this case because its members are birth parents, birth relatives, foster parents, and adoptive parents of children with varying amounts of Indian ancestry –

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[1] No counsel for a party authored this brief in whole or in part. No counsel for a party, or party, made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsels made a monetary contribution intended to fund the preparation or submission of this brief. All parties consented to the filing of this brief.

all of whom have seen or experienced the tragic consequences of applying the racial distinctions embedded in ICWA.

Tribal jurisdiction, whether regulatory or judicial, affects the parental, fundamental, and constitutional rights of United States citizens in many cases. These citizens include individuals of Indian ancestry who are not members of a federally recognized tribe, who have had no contact with a federally recognized tribe, and/or who have no desire for a political or other relationship with a federally recognized tribe.

These citizens also include individuals who are members of a tribe, but have chosen to live, work, and domicile beyond the borders of their tribe's reservation, sometimes for the express purpose of avoiding entanglement with their tribal government. They purposefully choose not to domicile within the confines of tribal government and intend for their Indian children to live and be raised outside tribal government.

Some citizens of non-Indian ancestry have no connection to tribal government, but have knowingly or unknowingly given birth to a child of some Indian ancestry. They often intentionally domicile off the tribe's reservation. They intend for their Indian children to live and be raised outside tribal government.

Alliance believes that the following argument will bring to the Court's attention relevant matter

not already brought to the Court's attention by the parties.

If affirmed, this case will further the chilling realization by state foster care and adoptive families of the possibility that a biological parent of an Indian child with minimal Indian ancestry may seek custody of the child under ICWA – outside the relevant state child custody law. A biological parent considering foster care or adoption as being in the best interests of their Indian child will face the horrifying uncertainty of whether it is safe to terminate their parental rights. Innocent Indian children, bonded and attached to their foster or adoptive families, face the danger of being torn from the homes and families and forced into the custody of strangers.

Alliance also believes that an Indian child's best interests are not inherently served through a forced political relationship with the child's tribe, and forced familial relationships with members of the tribe. A person's ancestry does not determine the person's values, emotions, motivations, skills, and inclinations. Numerous multi-racial children throughout the nation have been negatively affected by the application of the ICWA. Shockingly, Indian children who have never domiciled on, or been near, their tribe's reservation, nor involved in tribal customs or culture, are routinely removed from homes they love and placed with strangers. Sometimes, because of the racially based preferences embedded in ICWA, they are placed in homes that would be deemed unsafe for children of other ancestry.

SUMMARY OF ARGUMENT

Many of the ICWA sections addressed in this case impact Indian children in foster care, as well as Indian children not in foster care. While the case involves an adopted Indian child who was never in foster care, its resolution will impact: (1) foster care placements of Indian children, (2) terminations of parental rights involving Indian children in foster care, (3) preadoptive placements for Indian children in foster care, and (4) adoptive placements of Indian children in foster care.

To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it applies based upon ancestry – which is a proxy for race. Because this application is racially discriminatory and not narrowly tailored, it unconstitutionally denies the Indian child equal protection of the laws.

To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it deprives the Indian child and parents of their liberty interest and due process rights to domicile off the tribe's reservation, and to be subject to state law and jurisdiction – instead of tribal law and jurisdiction. This deprivation is based upon race and is unconstitutional.

To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it overrides state law and jurisdiction governing child care and custody. This unconstitutionally violates the right reserved to states to govern child care and custody.

Courts interpreting and applying ICWA have differed in the extent they consider an Indian child's best interests. A child's best interests, however, should be considered in every ICWA determination, particularly when the child is domiciled off the tribe's reservation. There is no presumption that residing with members of an Indian child's tribe is in the child's best interests, particularly when the child is domiciled off the tribe's reservation.

As held by some courts, ICWA applies only when an Indian child is removed from an existing Indian family and environment. If ICWA applies to an Indian child domiciled off the tribe's reservation, then it applies only if the child has significant cultural, social, and political contacts with the tribe.

If a parent of an Indian child is not a member of the child's tribe, then the tribe lacks inherent jurisdiction over the parent, even if the parent domiciles on the reservation. To the extent ICWA applies to the parent, it violates the equal protection provision of the federal constitution.

ARGUMENT

Among other things, this case involves the definition of a "parent" under ICWA, the voluntary and involuntary termination of parental rights under ICWA, a voluntary adoptive placement under ICWA, and the adoptive placement preferences under ICWA. *See Adoptive Couple v. Baby Girl*, 731 S.E.2d 550 (S.C. 2012) *and* 25 U.S.C. §§ 1903, 1912, 1913, 1915. More importantly, this case addresses

whether the application of ICWA violates the federal constitution.

1. The statutory and constitutional issues addressed in this case impact Indian children in foster care.

While this case centers on "adoption" and not "foster care," the sections of ICWA addressed in this case impact Indian children in foster care, as well as Indian children not in foster care. *See* 25 U.S.C. §§ 1903, 1912, 1913, 1915. The resolution of this case, therefore, will impact: (1) foster care placements of Indian children, (2) terminations of parental rights involving Indian children in foster care, (3) preadoptive placements for Indian children in foster care, and (4) adoptive placements of Indian children in foster care.

In addition, the resolution of this case may impact sections of ICWA not addressed or disputed in this case. These sections impact Indian children in foster care. For example, ICWA grants an Indian tribe exclusive jurisdiction over any child custody proceeding involving an Indian child "who resides or is domiciled within the reservation of such tribe." Id. § 1911(a). It also states that, absent good cause to the contrary, parental objection, and declination of tribal jurisdiction, a state court must transfer a state foster care placement or termination of parental rights proceeding involving an Indian child "not domiciled or residing within the reservation of the Indian child's tribe" to the jurisdiction of the tribe. Id. § 1911(b). ICWA also permits an Indian tribe to intervene in a state foster care placement or

termination of parental rights proceeding "at any point in the proceeding." Id. § 1911(c).

More importantly, the federal constitutional issues addressed in this case impact Indian children in foster care, as well as Indian children not in foster care.

As of September 30, 2011, there were approximately 8,000 American Indian and Native Alaskan children in foster care. Children's Bureau, United States Department of Health and Human Services, *The AFCARS Report* No. 19 (July 2012), *available at* http://www.acf.hhs.gov/programs/cb/resource/afcars-report-19. Between October 1, 2010 and September 30, 2011, approximately 5,200 American Indian and Native Alaskan children entered foster care, and approximately 4,650 exited foster care. Id. As of September 30, 2011, approximately 1,850 American Indian and Native Alaskan children in foster care were waiting to be adopted. Id.

Many cases involving ICWA and foster care children occur in state courts, are not appealed, and are not reported on an electronic legal database. Yet, for the 2012 calendar year, a simple LEXIS search of state and federal cases mentioning "ICWA" and having a core-term of "foster" resulted in over 100 cases. And, many cases involving ICWA and foster care children are currently pending.

For example, one state court of appeals is currently considering a case involving a 31-month old Indian child in foster care. The child entered

foster care at approximately 9 months of age. The child and biological parents are domiciled over 1,000 miles from the Indian tribe's reservation. Pursuant to ICWA, the Indian tribe was notified when the child entered foster care, and was notified of all child custody proceedings.

After a juvenile court terminated the biological parents' rights, during an appeal to a superior trial court, and approximately 16 months after the child entered foster care, the tribe intervened. Approximately 17 months after the child entered foster care, the tribe moved to transfer jurisdiction to tribal court.

The trial court granted the motion to transfer. The guardian ad litem moved to stay the transfer pending appeal. During a hearing on the motion to stay, two experts testified that, because of multiple moves and trauma during the child's first 9-months, the Indian child suffered from inhibited reactive attachment disorder. Because the case involves legal questions of first impression in the state, and because there was "overwhelming" evidence that transferring physical custody would irreparably harm the child, the trial court stayed the transfer pending appeal.

Again, many cases involving ICWA and foster care children are currently pending. They need direction from the Court regarding application of ICWA.

Unless a tribe acts immediately upon an Indian child entering foster care, applying ICWA to

the child may extend the child's time in foster care, may prohibit or inhibit non-Indians from fostering and/or adopting the child, and may delay the child's adoption. This is particularly true when the tribe delays intervening or moving to transfer the proceeding, which is more likely the further the child is domiciled from the tribe's reservation.

In addition, a delay caused by applying ICWA to an Indian child in foster care may jeopardize federal financial assistance related to the child. Title IV-E of the Social Security Act provides foster care financial assistance to states with an approved "plan" meeting certain minimum requirements. 42 U.S.C. §§ 670-679c. Among other things, the plan must have a "case review system" meeting certain minimum requirements. Id. §§ 671(a)(16), 675(5). The case review system must, among other things, assure that a permanency hearing for a child in foster care is held no later than 12 months after the child entered foster care. Id. § 675(5)(C). In addition, the case review system must assure that, in general, if a child has been in foster care for 15 of the most recent 22 months, then the state must petition to terminate parental rights and pursue adoption. Id. § 675(5)(E).

A delay caused by applying ICWA to an Indian child in foster care may result in missing these deadlines and jeopardizing federal foster care assistance. Whether for logistical, geographical, or other reasons, the likelihood of a delay caused by applying ICWA is greater when the Indian child is domiciled off the tribe's reservation.

A statute must be applied in a manner that is constitutional and that avoids "grave doubts" about its constitutionality. *See Rust v. Sullivan*, 500 U.S. 173, 191 (1991) *and Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). Likewise, a statute must be applied in a manner that avoids constitutional problems, "whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Suarez*, 543 U.S. 371, 380-81 (2005).

As discussed below, applying ICWA to an Indian child domiciled off the tribe's reservation violates the federal constitution. This is true for the adopted Indian child before the Court, and for Indian children in foster care.

2. To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the equal protection, due process, liberty, and state rights provisions of the federal constitution.

A. To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the equal protection provisions of the federal constitution.

Under the fourteenth amendment to the federal constitution, a person may not be denied the equal protection of the laws. U.S. Const. amend. XIV, § 1. Under ICWA, an "Indian child" is an unmarried person under age eighteen who is: (1) a

member of an Indian tribe or (2) eligible for membership in an Indian tribe and is the biological child of a member. 25 U.S.C. § 1903(4). The Indian tribe determines whether the child is a member, or eligible for membership. *See In re L.S.*, 812 N.W.2d 505, 509 (S.D. 2012); *Bruce L. v. W.E.*, 247 P.3d 966, 975 (Alaska 2011); *and* Cohen's Handbook of Federal Indian Law §§ 4.01(2)(b), 11.02(2) (Nell Jessup Newton ed., 2012) [hereinafter, Cohen's Handbook].

Tribal membership is typically based upon: (1) a specified degree of ancestry from an individual on a base list or roll and/or (2) domicile at birth. Cohen's Handbook, *supra* at 3.03(2); *See also* 25 U.S.C. § 479 (as used in the Indian Reorganization Act of 1934, "Indian" includes Indian descendants who are tribal members and their descendants residing within a reservation, and all other individuals of one-half or more Indian blood). The required degree of ancestry or percentage of blood quantum varies widely, with some tribes permitting any descendant, regardless of blood quantum. Cohen's Handbook, *supra* at 3.03(2). Tribal membership, therefore, is based upon ancestry or domicile.

Baby Girl's biological father ("Birth Father") is 3/128th Cherokee blood quantum, although he seems to have had some uncertainty or ambivalence regarding his ancestry and tribal membership. Brief for Guardian Ad Litem, as Representative of Respondent Baby Girl, Supporting Reversal at 18, n. 6. Interestingly, Birth Father's initial legal pleading stated that neither he nor Baby Girl had "Native American blood." *Adoptive Couple, supra* at 555.

Approximately three months later, Birth Father amended the pleading to state that both he and Baby Girl had "Native American blood." Id. at 555 n. 12.

Baby Girl's biological mother ("Birth Mother") is not a member of the Cherokee Nation. Id. at 552, 554 n. 5. Baby Girl is 3/256th Cherokee blood quantum and is a member of, or eligible for membership in, the Cherokee Nation. Br. for G.A.L., *supra* at 18, n. 6 *and Adoptive Couple*, *supra* at 555, 560 n. 18.

In 1954, the Court held that segregation based upon race violated the equal protection provision of the federal constitution. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

In 1974, the Court held that a Bureau of Indian Affairs ("BIA") employment preference for Indians was not "racial discrimination." *Morton v. Mancari*, 417 U.S. 535, 553 (1974). Instead it was a preference "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." Id. at 554. At that time, the Court opined that without this so-called political distinction, a large body of federal statutes granting special treatment for Indians "living on or near reservations" would be "effectively erased." Id. at 552. The Court noted the Indian preference was similar to legal requirements that elected officials inhabit or reside within geographic areas related to their offices. Id. at 554. Since *Morton*, the Court's jurisprudence, including decisions specifying the narrow limits of tribal governmental jurisdiction, draws into question the accuracy and legitimacy of

this concern, particularly when contrasted with the rights of individuals.

In *Morton*, the Court held that the Indian preference was "reasonably and directly related to a legitimate, nonracially based goal," which is the "principal characteristic" generally absent from prohibited racial discrimination. Id. at 554. The Court noted that on "numerous occasions" it had upheld legislation singling out Indians for special treatment. The cases cited by the Court involved real estate tax immunity on an Indian homestead, inheritance of reservation land, regulation of affairs on a reservation, and federal benefits for Indians living "on or near" a reservation. Id. at 554-55.

In other parts of its opinion, the Court noted that a reason for the preference was to facilitate Indian BIA employees participating in or affecting "various services on the Indian reservations." Id. at 543-44. The Court also noted the "unique legal status" of tribal and "reservation-based" activities, and matters concerning tribal or "'on or near' reservation" employment. Id. at 546, 548.

In *Morton*, therefore, a primary consideration for the Court's finding that the Indian preference or special treatment was racially neutral – and constitutional – was its application to Indians living on or near their reservation. Otherwise, the preference or special treatment was racially discriminatory and unconstitutional.

Recognizing this reasoning, when Congress considered and enacted ICWA in 1978, Pub. L. No.

95-608, 92 Stat. 3069 (1978), the United States Department of Justice ("Department") noted, "The class of persons whose rights under the bill may, in our opinion, constitutionally be circumscribed by this legislation are the members of a tribe, whether living ***on or near*** a reservation." H.R. Rep. No. 95-1386 at 36 (1978) (emphasis supplied).

In addressing whether ICWA could constitutionally apply to individuals not living on Indian lands or the reservation, the House of Representatives Committee on Interior and Insular Affairs noted three Court cases. These cases, however, were criminal cases addressing the power of Congress to regulate commerce with Indian tribes. They did not involve racial discrimination. Id. at 15.

In enacting ICWA, Congress intended to protect tribal communities and the participation of Indian children in tribal communities. 25 U.S.C. § 1901(5) *and Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989). By definition, a "community" includes individuals domiciled near one another.

For purposes of ICWA, the term "reservation" means: (1) "Indian country" as defined in 18 U.S.C. § 1151 and (2) other land, title to which is: (a) held by the United States in trust for the benefit of any Indian tribe or individual or (b) held by any Indian tribe or individual subject to a restriction by the United States against alienation. 25 U.S.C. § 1903(10). As noted by the Court, "reservation" is defined "quite broadly" in ICWA. *Holyfield, supra* at 42.

In 1984, the Court reversed a child custody determination based upon race because it violated the equal protection provision of the federal constitution. *Palmore v. Sidoti*, 466 U.S. 429 (1984).

In 1989, the Court addressed the meaning of the term "domiciled" within a reservation as used in the exclusive jurisdiction section of ICWA. *Holyfield, supra*; *See also* 25 U.S.C. § 1911(a). It held that domicile is "not necessarily" the same as residence. For example, the domicile of most minor children is the domicile of their parents. The domicile of an illegitimate child is the domicile of the child's mother. Id. at 48-49.

Because it was "undisputed" that the biological mother was domiciled on the tribe's reservation, the Court held the Indian children in the case were domiciled on the reservation. Id. at 48-49, 53. Because the Indian children were domiciled on their reservation, the Court had no reason to address whether the application of ICWA was racially discriminatory.

In 2000, the Court held that a requirement limiting voting in a Hawaiian election to individuals with specific ancestry was an unconstitutional racial discrimination. *Rice v. Cayetano*, 528 U.S. 495, (2000). The Court explained that ancestry can be a "proxy" for race, and can be used "as a racial definition and for a racial purpose." Id. at 514. Indeed, "racial discrimination" singles out persons "solely because of their ancestry or ethnic characteristics." Id. at 515 (*citing Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613, (1987)).

As the Court added, "The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name." Id. at 517. The Court described race as a "forbidden classification" because it "demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." Id. Inquiring into "ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens." Id.

In holding the requirement unconstitutional, the Court expressly refused to expand its holding in *Morton*. Id. at 518-22. The Court added that the failure of a class defined by ancestry to include all members of the race does not make the classification race neutral. Id. at 517.

In 2007, the Court noted that it is "well settled" that when government distributes burdens or benefits on the basis of race, the action is reviewed under strict scrutiny. The use of race must be narrowly tailored to achieve a compelling government interest. Otherwise, the use is an unconstitutional violation of due process and equal protection. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007); *See also* U.S. Const. amends. V, XIV, § 1. Indeed, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Id. at 745-46. A child born in the United States to a member of an Indian tribe is a

United States citizen. U.S. Const. amend. XIV, § 1 *and* 8 U.S.C. § 1401(b).

To the extent an "Indian child" under ICWA is determined based upon Indian ancestry and domicile on the tribe's reservation, then the determination is narrowly tailored and may not violate the equal protection provisions of the federal constitution. However, to the extent the determination is based upon Indian ancestry and not domicile on the tribe's reservation, then it is racially based, is not narrowly tailored, and violates the equal protection provision of the federal constitution.

Accordingly, to the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the equal protection provision of the federal constitution.

B. To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the due process and liberty provisions of the federal constitution.

Under the fifth and fourteenth amendments to the federal constitution, a person may not be deprived of liberty without due process of law. U.S. Const. amends. V, XIV, § 1. Freedom of association, and freedom of choice, associated with family relationships are personal liberty interests protected by the federal constitution. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-20 (1984) *and Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 842-47 (1977).

As noted by the Court, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Smith*, *supra* at 843. Likewise, the personal relationships and affiliations regarding the "creation and sustenance of a family," like marriage, childbirth, and the raising and education of children are protected. *Roberts*, *supra* at 619. They are entitled to a "substantial measure of sanctuary from unjustified interference by" state or federal government. Id. at 618.

ICWA includes extensive provisions and heightened standards regarding foster care placement, termination of parental rights, preadoptive placement, and adoptive placement proceedings. *See* 25 U.S.C. §§ 1902, 1911-1923.

As noted above, ICWA grants an Indian tribe exclusive jurisdiction over a child custody proceeding involving an Indian child domiciled on the tribe's reservation. It also permits transfer to tribal jurisdiction of a state foster care placement or termination of parental rights proceeding involving an Indian child domiciled off the tribe's reservation. While a parent of the Indian child may object to and prevent the transfer, the Indian child may not object to or prevent the transfer. 25 U.S.C. § 1911(b). That is, if an Indian child has a guardian ad litem to protect the child's best interests, then the guardian ad litem may not object to or prevent the transfer.

A fundamental liberty right of families is determining where to domicile, and to what local law

and jurisdiction to be subject. If an Indian parent and child decide to domicile on the tribe's reservation, and be subject to tribal law and jurisdiction, then their liberty interest protects this right. Likewise, if an Indian parent or child decides to domicile off the tribe's reservation, and be subject to state law and jurisdiction, then their liberty interests protect this right. Otherwise, the Indian parent and child would have no freedom to leave the reservation and tribal law and jurisdiction.

In *Holyfield*, the Court noted that the law of domicile cannot permit an individual "reservation-domiciled" tribal member to defeat the tribe's exclusive jurisdiction. *Holyfield*, *supra* at 53; *See also* 25 U.S.C. § 1911(a). The liberty interest of an Indian parent and child, however, permits them to domicile off the reservation to defeat the tribe's jurisdiction.

If ICWA applies to an Indian parent and child domiciled on the tribe's reservation, then it may not violate their personal liberty rights. If, however, ICWA applies to an Indian parent and child domiciled off the tribe's reservation, then it violates their liberty interests. Otherwise, the Indian parent and child could never escape the application of ICWA and tribal jurisdiction, even though domiciling off the tribe's reservation.

Accordingly, to the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the due process and liberty provisions of the federal constitution.

C. To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the state rights provisions of the federal constitution.

Under the tenth amendment to the federal constitution, powers not delegated to the federal government, nor prohibited by it to the states, are "reserved to the States." U.S. Const. amend. X. As the Court has "consistently recognized," the law governing domestic relations between parent and child is reserved to the states, and not the federal government. *Rose v. Rose*, 481 U.S. 619, 625 (1987). Before a state law governing these domestic relations is overridden, it "must do 'major damage' to 'clear and substantial' federal interests." Id.

Standards and protections regarding child care and custody have traditionally been addressed by the states, and not by the federal government. ICWA, however, includes extensive provisions and heightened standards regarding child custody proceedings. It also grants an Indian tribe exclusive jurisdiction over any child custody proceeding involving an Indian child "who resides or is domiciled within the reservation of such tribe." 25 U.S.C. § 1911(a). It also addresses the transfer of a state foster care placement or termination of parental rights proceeding involving an Indian child "not domiciled or residing within the reservation of the Indian child's tribe." Id. § 1911(b).

Applying state law and jurisdiction to child custody proceedings involving an Indian child

domiciled on a reservation may do major damage to federal interests. To the extent ICWA applies to an Indian child domiciled on the tribe's reservation, it may constitutionally override state law and jurisdiction. However, applying state law and jurisdiction to child custody proceedings involving an Indian child domiciled off the tribe's reservation, but within the state, does not do major damage to a clear and substantial federal interest. To the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it may not constitutionally override state law or jurisdiction.

Agreeing, and as noted during congressional consideration of ICWA, the Department of Justice thought that Congress could override state law when addressing "reservation Indians." H.R. Rep. No. 95-1386 at 40 (1978); *see also In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 n. 1 (Ind. 1988). The Department, however, was not convinced that Congress' power to control litigation involving "nonreservation Indian children and parents" under the Indian commerce clause was "sufficient to override the significant State interest in regulating the procedure to be followed by its courts in exercising State jurisdiction over what is a traditionally State matter." Id. It seemed to the Department that the "Federal interest in the off-reservation context is so attenuated that the 10th Amendment and general principles of federalism preclude the wholesale invasion of State power contemplated by [ICWA]." Id.

As noted above, the Court held that the Indian children in *Holyfield* were domiciled on their

reservation. The Court, therefore, had no reason to address whether the application of ICWA violated the tenth amendment to the federal constitution.

Accordingly, to the extent ICWA applies to an Indian child domiciled off the tribe's reservation, it violates the state rights provisions of the federal constitution.

D. Because Baby Girl was domiciled off Indian land, the application of ICWA to her violates the federal constitution.

Birth Father's family "had Indian land" in Oklahoma. *Adoptive Couple v. Baby Girl, supra* at 565. Baby Girl's biological parents ("Birth Parents"), however, were not married. Id. at 552-53. As noted above, the domicile of an illegitimate child is the domicile of the child's mother. As an illegitimate child, Baby Girls' domicile is Birth Mother's domicile.

Because Birth Parents did not live together before Baby Girl's birth, and because of their "strained" and later broken relationship, Birth Mother was not domiciled on the Indian land. Id. at 553. Because neither Birth Father nor his parents contacted Birth Mother while she was hospitalized for Baby Girl's birth, and because Birth Father did not see Baby Girl for approximately 4 months after her birth, Baby Girl was not domiciled on the Indian land. Id. at 554-55. Baby Girl, therefore, was not domiciled on a "reservation" under ICWA.

Accordingly, because Baby Girl was domiciled off Indian land, the application of ICWA to her violates the federal constitution.

3. An Indian child's best interests should be considered in every "good cause" and other determination under ICWA, particularly when the child is domiciled off the tribe's reservation. There is no presumption that residing with members of an Indian child's tribe is in the child's best interests, particularly when the child is domiciled off the tribe's reservation.

As noted above, under ICWA, in a state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child domiciled off the tribe's reservation, the state court must transfer the proceeding to tribal jurisdiction, "in the absence of good cause to the contrary." 25 U.S.C. § 1911(b). Also under ICWA, in any foster care, preadoptive placement, or adoptive placement of an Indian child, preferences are given, "in the absence of good cause to the contrary." Id. §§ 1915(a), (b).

Also under ICWA, Congress declared that it is the Nation's policy to: (1) protect the best interests of Indian children and (2) promote the stability and security of Indian tribes and families. 25 U.S.C. § 1902. The meaning of this declaration is expressed by the ordinary meaning of the words used. *Holyfield*, *supra* at 47. Based upon the ordinary meaning of the words used, the Nation has two

policies. The first is protecting the best interests of Indian children. The second is promoting the stability and security of Indian tribes and families. They are separate policies. While the policies may, or may not, overlap, they are separate and distinct policies.

In a footnote, the *Holyfield* Court agreed with a state court that ICWA is based on the "fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." *Holyfield*, *supra* at 50 n. 24. Based upon this and other statements in *Holyfield*: (1) state courts have disagreed whether a Indian child's best interests may be considered in determining whether "good cause to the contrary" exists to deny transfer of jurisdiction or to deviate from placement preferences, *see, e.g.*, *In re Zylena R.*, 284 Neb. 834, 849-52, 825 N.W.2d 173 (Neb. 2012) *and cases cited therein*; *In re J.L.*, 779 N.W.2d 481, 486-87 (Iowa Ct. App. 2009) *and cases cited therein*; *In re Adoption of Baby Girl B.*, 67 P.3d 359, 370-72 (Okla. Civ. App. 2003); *In re Adoption of S.W.*, 41 P.3d 1003, 1009-10 (Okla. Civ. App. 2001) *and cases cited therein*; *In re Guardianship of J.O.*, 743 A.2d 341, 348-49 (N.J. Super. Ct. App. Div. 2000) *and cases cited therein*; *and In re A.E.*, 572 N.W.2d 579, 583-85 (Iowa 1997) *and cases cited therein*, and (2) state courts have held that protecting an Indian child's relationship with the tribe is presumed to be in the child's best interests, *see, i.e.*, *Navaho Nation v. Arizona Dep't of Econ. Sec.*, 284 P.3d 29, 35-36 (Ct. App. Ariz. 2012); *In re A.R.*, No. 11CA1448, 2012 Colo. App. LEXIS 2144, 7 (Colo. App., Nov, 8, 2012);

and In re A.T.W.S., 899 P.2d 223, 224 (Colo. App. 1994).

An Indian child, however, is the subject of rights, and not the object of rights. That is, an Indian child has the right for his or her best interests to be protected and promoted. An Indian child is not the object of the tribe's rights, particularly when the child is domiciled off the tribe's reservation. The rights of an Indian child are different from the rights to the child. The rights of an Indian child include having his or her best interests protected and promoted. These rights are different from the tribe's right to the child, particularly when the child is domiciled off the tribe's reservation.

As noted by the Court, a child's welfare is the "controlling factor" in child custody decisions. *Palmore, supra* at 432. Likewise, a state has a "duty of the highest order" to protect a child's best interests, particularly for a child "of tender years." Id. at 433. Granting custody based upon a child's best interests is "indisputably a substantial government interest" for equal protection purposes. Id.

The inability to consider an Indian child's best interests in making "good cause" determinations, and presuming that residing with members of the child's tribe is in the child's best interests, are inconsistent with ICWA. *See* 25 U.S.C. § 1902. The inability to consider best interests, and the presumption, are particularly inappropriate when an Indian child is domiciled off the tribe's reservation.

Protecting and promoting a child's best interests are the paramount considerations in ICWA and other child custody proceedings. While not considering the best interests of an Indian child domiciled on the tribe's reservation in "good cause" determinations seems inappropriate, not considering the best interests of a child domiciled off the reservation seems even more inappropriate. By domiciling off the tribe's reservation, the Indian child's parents presumably believed that to be in the child's best interests.

While keeping an Indian child domiciled on the tribe's reservation with the tribe may presumptively be in the child's best interests, this is not true for an Indian child domiciled off the reservation. By definition, a child domiciled off the reservation is not with his or her tribe or community, particularly if the child is domiciled far off the reservation. While facts and circumstances may indicate that returning an Indian child domiciled off the tribe's reservation to his or her tribe is in the child's best interests, this is not presumed. If anything, there is a presumption that returning the Indian child is not in his or her best interests.

In the present case, the dissent noted, "It is apparent that the decision of the family court judge was influenced to some extent by the erroneous legal conclusion that ICWA eclipses the family court's obligation to determine what would be in the child's best interests." *Adoptive Couple, supra* at 579. The majority acknowledged the "settled principle" that a child's best interests is "primary, paramount and

controlling" in all child custody cases, but the majority "ignore[d] [the principle] in application." Id. Based upon the guardian ad litem's testimony and report, and other evidence, the dissent concluded that placing Baby Girl with her adoptive parents would serve her best interests. Id. at 580.

An Indian child's best interests should be considered in every "good cause" and other determination under ICWA, particularly when the child is domiciled off the tribe's reservation. Because Baby Girl is domiciled off the tribe's reservation, her best interests should be considered. There is no presumption that residing with members of an Indian child's tribe is in the child's best interests, particularly when the child is domiciled off the tribe's reservation. Because Baby Girl is domiciled off the tribe's reservation, there is no presumption that residing with members of her tribe is in her best interests. As noted by the dissent, placing Baby Girl with her adoptive parents is in her best interests.

4. If ICWA applies to an Indian child domiciled off the tribe's reservation, then it applies only if the child is part of an existing Indian family or environment.

As noted in ICWA, Congress found that states often failed to recognize the "cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). Congress also declared that it is a national policy to promote the "stability and security of Indian tribes and families" in a manner that "reflect[s] the unique values of Indian culture." Id. § 1902. ICWA, therefore,

protects the culture, values, and social standards "prevailing" in a tribe.

This protection prevents the removal of an Indian child from a family or environment "reflect[ing]" tribal culture, values, and social standards. ICWA, therefore, applies only when an Indian child is being removed from a family or environment "reflect[ing]" tribal culture, values, and social standards.

Agreeing, some state courts have held that ICWA applies only when an Indian child is being removed from an existing Indian family and environment. *See In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996) *and In re Hampton*, 658 So. 2d 331, 334-37 (La. Ct. App. 1995); *and In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988).

That is, ICWA does not apply when an Indian child is not being removed from an Indian cultural setting, the biological parents have no substantive ties to a tribe, and neither biological parent resided or plans to reside within a reservation. *In re C.E.H.*, 837 S.W.2d 947, 951-52 (Mo. Ct. App. 1992); *see also In re S.A.M.*, 703 S.W.2d 603, 608-09 (Mo. Ct. App. 1986).

ICWA does not apply when an Indian child has minimal contact with the tribe's members, minimal contact with the tribe's reservation, minimal involvement in the tribe's activities, and minimal participation in the tribe's culture. *S.A. v.*

E.J.P., 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990).

ICWA does not apply when an Indian child has had no contact with the tribe's reservation and the biological parents are domiciled off the tribe's reservation. *In re K.L.D.R.*, No. M2008-00897-COA-R#-PT, 2009 Tenn. App. LEXIS 163, at 10-12 (Tenn. Ct. App. 2009) *and In re Morgan*, No. 02A01-9608-CH-00206, 1997 Tenn. App. LEXIS 818, at 42-44 (Tenn. Ct. App. 1997).

Courts disagree whether *Holyfield* supports or opposes the application of ICWA to an Indian child who is not part of an existing Indian family or environment. *See In re Baby Boy C.*, 805 N.Y.S.2d 313, 319-23 (N.Y. App. Div. 2005) *and cases cited therein*; *In re Morgan*, No 02A01-9608-CH-00206, 1997 Tenn. App. LEXIS 818, at 24-41 (Tenn. Ct. App. 1997) *and cases cited therein*; *Rye v. Weasel*, 934 S.W.2d 257, 262-63 (Ky. 1996) *and cases cited therein*; *and Crystal R. v. Super. Ct. of Santa Cruz Cnty.*, 69 Cal. Rptr. 2d 414, 715 (Cal. Ct. App. 1997) *and cases cited therein*. Through *Holyfield*, the Court created confusion regarding the application of ICWA.

If ICWA applies to an Indian child domiciled off the tribe's reservation, then it applies only if the child is part of an existing Indian family or environment. The child must have significant cultural, social, and political contacts with the tribe reflecting the tribe's unique values.

In the present case, the Supreme Court of South Carolina concluded that ICWA applies, regardless of whether an Indian child is part of an existing Indian family or environment. *Adoptive Couple, supra* at 558, n. 17. For the reasons discussed above, however, ICWA must apply only to an Indian child domiciled on the tribe's reservation. If ICWA applies to an Indian child domiciled off the tribe's reservation, then it applies only if the child is part of an existing Indian family or environment.

5. A tribe lacks inherent jurisdiction over a nonmember. To the extent ICWA applies to the parent of an Indian child, which parent is not a member of the tribe, then it violates the equal protection provision of the federal constitution, even if the parent domiciles on the tribe's reservation.

Under ICWA, a "parent" means "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child." 25 U.S.C. § 1903(9). As noted above, the child's tribe has exclusive jurisdiction over all child custody proceedings, and concurrent jurisdiction over foster care placement and termination of parental rights proceedings, involving the Indian child. Id. §§ 1911(a), (b). As also noted above, ICWA includes substantive provisions governing child custody proceedings. As held by the Court, however, a tribe generally lacks inherent jurisdiction over a nonmember. *Montana v. United States*, 450 U.S. 544, 563-67 (1980); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206-12 (1978).

While a tribe retains inherent jurisdiction to "regulate domestic relations among members," this jurisdiction does not include domestic relations involving a nonmember. Id. at 564. Likewise, while a tribe retains inherent jurisdiction to regulate a nonmember's consensual business relationships with the tribe or its members, this jurisdiction does not include a nonmember's consensual personal relationships with the tribe or its members. Id. at 565. Further, while a tribe retains inherent jurisdiction to regulate the conduct of nonmembers that threaten political integrity, economic security, health, or welfare of the tribe, this jurisdiction does not include the conduct of nonmembers that does not threaten these areas. Id. at 566.

To the extent ICWA applies to the parent of an Indian child, which parent is not a member of the child's tribe, it violates the equal protection provision of the federal constitution. This is true even if the parent is domiciled on the tribe's reservation. As a United States citizen or resident, the parent is entitled to the same protections afforded to other parents who are not members of the tribe.

CONCLUSION

The Court should reverse the Supreme Court of South Carolina holding.

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AMICUS CURIAE BRIEF

No. 12-399

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE, PETITIONERS

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, ET AL.

ON A WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. The South Carolina Supreme Court's application of the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*, adversely affects CERA members who have children and grandchildren subject to the act. The ruling also adversely impacts non-Indian parental rights and potentially violates the equal protection rights of all children to have their best interest's applied in state courts making custody decisions.

CERF submits this *amicus curiae* brief to add the perspective of its members who have been adversely affected by federal Indian policy and want that policy to significantly change. CERF promotes the belief that the equal protection of the laws should apply to all persons in the United States. The definition of "person" and the question of whether the Congress has the authority to create classifications that separate the rights of human beings within the jurisdiction of the United States has been the most contested and difficult question posed to this Supreme Court. Many of these answers in regards to former slaves were answered by the Civil War and the Amendments passed following that war. But "Indians not taxed" were specifically exempted from the requirements of the 14th

Amendment. CERF believes that this omission was deliberate not to protect tribal sovereignty or the historical relations with the Indian tribes but instead was deliberately designed to preserve Congressional authority to make racial classifications. CERF believes this is the authority being asserted by Congress in the Indian Child Welfare Act (ICWA).

All of the parties have filed blanket consent letters to the filing of all *amicus curiae* briefs before this Court for this case.[1]

SUMMARY OF THE ARGUMENT

CERF does not believe that any law based on a racial classification like the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 *et seq.*, can be applied in any court without depriving all persons who appear in that court of some or all of their fundamental rights as human beings. That deprivation of individual rights may include the loss of due process and equal protection rights and the loss of parental rights as happened in this case. This deprivation of rights also includes the Indian children for whom the ICWA was passed who instead of having their fundamental rights protected under the "best interest's of the child test" are given "special" rights as defined by Congress. In the ICWA Congress altered the rights of Indian parents, non-Indian parents and the rights of any child who can be

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, CERF, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

classified as "Indian" in favor of creating a special "tribal" right over the child in the Indian tribe.

This brief begins with a history of federal Indian policy from a federalism viewpoint. It continues by demonstrating that there is no way to avoid the fact that Congress' power to enact ICWA is based on the *Dred Scott v. Sandford*, 60 U.S. 393 (1857) decision. *See Elk v. Wilkins*, 112 U.S. 94 (1884). The *Dred Scott* rationale reconfigured the Congressional power to domesticate federal territorial land and the rights of the people living on those lands. This territorial power still exists as part of federal Indian common law and federal Indian policy. The Congress and the Executive branch continue to treat Indians and Indian tribes as "political" rather than as racial entities allowing the permanent racial discrimination created in *Dred Scott* to survive into the 21st century. *See Morton v. Mancari*, 417 U.S. 535 (1974). No matter how ICWA is politically justified it does not change what ICWA is or does in any case where it is applied. Any child that can be classified as "Indian" is treated as a "resource" of the Indian tribe and not as an individual human being entitled to have their best interest's determined by the court. 25 U.S.C. § 1901(3). Congress in ICWA is indefinitely preserving their territorial authority over "Indians" by allowing Indian tribes to classify any child an "Indian" they claim is eligible for tribal membership. This classification prevents a child claimed by a tribe from having the same constitutional rights and protections all other children born in the United States receive. This Court needs to end the territorial power of Congress that allows this historically justified racial discrimination to continue to exist and include the

Indians as part of the "sovereign people" of the United States.

Another reason to rule ICWA unconstitutional is to restore the jurisdiction and independence of the state courts over domestic relations cases. The ICWA applies the IRA goal of restoring and promoting separate tribal governments first articulated in *Dred Scott*. It is not accidental that ICWA has broken down the jurisdiction and independence of the state courts and turned them into little more than Article I federal territorial courts just like Indian tribal courts. Just two years after *Dred Scott* and again to specifically preserve slavery and to uphold the Fugitive Slave Act of 1850 this Court removed the authority of state courts to find federal laws unconstitutional or to use the writ of habeas corpus to protect individuals from contrary federal laws in *Ableman v. Booth*, 62 U.S. 506 (1859). The holding in *Ableman* was done to preserve and protect the *Dred Scott* decision. The *Ableman* decision fundamentally altered the role of the state courts and lessened the sovereign status of the states within the constitutional structure. Striking down ICWA as unconstitutional by including the "Indians" within the "sovereign people" also can be used to restore the proper role of the state courts and thereby the states within the constitutional structure.

This Court needs to find a remedy that will protect the constitutional rights of this baby girl. Applying a remedy that also restores the independence of the state courts and strengthens federalism by removing the possibility that land within the jurisdiction of the United States can be treated as "territory" can make this an important ruling.

ARGUMENT

This Court has shown a real interest in preserving and restoring aspects of the doctrine of federalism to limit ever expanding federal authority against the rights of individuals. *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997). This Court has also acknowledged that restoring tribal interests in mostly non-Indian areas upsets the "justifiable expectations" of the property owners and citizens of that area. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). In this case the non-Indian adoptive parents lost their fundamental rights to parent the child they had raised and supported since birth in the state courts of South Carolina because of the Indian Child Welfare Act (ICWA). The complete loss of their parental rights is a direct result of state domestic relations and adoption laws being preempted by the ICWA. It is time that this Court end the racial classification created in the *Dred Scott* decision that Indians are not fully domesticated people capable to act as full citizens of the United States subject to the same responsibilities and constitutional rights as all other citizens. The natural father of the child that is the subject of this case should not be entitled to "special rights" because he has some Indian heritage. His daughter should have the same right as every child born in the United States to grow up in a home that can fulfill her best interests and raise her to be an independent sovereign person in her own right. The ICWA is unconstitutional for forcing this child to be treated as a resource of an Indian tribe to deprive her constitutional right to be one of the sovereign people of the United States. If we do not make all of our children

proud to be an American and to be proud of our joint heritage under the Constitution of the United States we will lose the only thing that unifies us as a people.

I. MODERN FEDERAL INDIAN POLICY IS BASED ON THE *DRED SCOTT* DECISION

a. Federal Indian Policy before the *Dred Scott* decision.

The main policy and purpose of the newborn United States toward Native Americans was the acquisition and domestication of territorial land. The Indian Commerce Clause, Art. I, Sec. 8, Cl. 3, was developed to avoid military conflict in the territorial lands allowing continued settlement and expansion of civilization. Only lands ceded by States outside of their boundaries were deemed "federal territory" under the Property Clause, Art. IV, Sec. 3, Cl. 2. These federal territorial lands were subject to the Northwest Ordinance of 1787 originally under the Articles of Confederation, and then adopted as the first law passed under the new Constitution. The Northwest Ordinance in Article 3 contained a written federal Indian policy designed to protect and assimilate the Native Americans. It also contained a specific provision prohibiting slavery in Article 6. This provision became a major issue in the *Dred Scott* case 70 years later. *Id.* at -- The Northwest Ordinance contained the basic Indian policy but few details of how to legally acquire land from Native Americans and tribes. The development of federal territorial law required decisions on how to legally acquire lands from Indian tribes to allow those lands to become part of the public

domain subject to disposal under the Homestead Acts and other federal cession laws as required by the Property Clause. Territorial land law by English definition encompassed the war powers necessary to civilize and domesticate the new land. Similarly Congress determined the processes and rights of persons in the territories until those territories became States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). Importantly, the distinction made by the English as to domestic versus territorial law had been a major cause of the Revolutionary War itself by denying to the colonists the constitutional rights of Englishmen. The Framers of our Constitution because of this distinction in fundamental rights between the application of domestic and territorial law specifically required that Congress "dispose of the territories." Property Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States was defined by this Court as allowing the United States to retain territorial land only on a temporary basis. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was meant to prevent the United States from being able to use the territorial war powers as domestic law against the States and individuals. It is one of the most fundamental pieces of the structure of our Constitution.

The "Indian title" case of *Johnson v. McIntosh*, 21 U.S. 543 (1823) presented the problem of whether the United States was the successor to the sovereignty established by England over the Northwest Territory and former colonies. This was not a federalism question because the United States Congress as part of the compromise to enable the Louisiana Purchase had passed a statute authorizing the President to negotiate

the removal of any Indian tribe East of the Mississippi to the Western territories and conceding that those Indians and Indian Tribes that remained in the Eastern States were under state jurisdiction. *See* Act of March 26, 1804, § 15, 2 Stat. 289. This act has never been repealed. In a clever application of constitutional law, Chief Justice Marshall preserved the concept of "Indian title" but divested it from its origins in Europe by ruling that only the United States as the winner of the Revolutionary War had the authority to accept the Indian land cessions by treaty. Because the United States had already conceded that it did not control Indian land in the Eastern States in 1804, the resolution of the Indian title question that removed the British cloud of title to millions of acres of Western lands only invigorated the outcry for the removal and actual cession of the Indian title in the original States.

In the 1820's the President began to vigorously pursue a removal policy of all Indians east of the Mississippi River. Congress passed the federal Removal Act of 1830, 4 Stat. 411, to define and enforce the removal policy agreed to in 1804. The Removal Act was specifically drafted to meet the obligations of the federal government to the States to remove the Indians, dispose of the "Indian title" to the lands they occupied and fulfill their federal treaty interests on actual federal territory West of the Mississippi as required by the 1804 Louisiana Purchase statute so that state jurisdiction would no longer be impaired in the Eastern states.

Chief Justice Marshall disagreed with the Removal Act policy defined by Congress and tried to interfere with it by his rulings in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v.*

Georgia, 31 U.S. 515 (1832). Congress responded by passing the 1834 Indian Trade and Intercourse Act, 4 Stat. 729, deliberately ceding that all Indian tribes and Indian land East of the Mississippi River would no longer be under federal protection once their lands were exchanged pursuant to the Removal Act, overruling *Worcester* by statute. This policy was harsh toward the Indians. The policy deliberately displaced them from their ancestral lands to make way for European settlement. Nowhere was this more obvious than the infamous "Trail of Tears." The young nation to progress had to displace the old and complacent sentimental views of Native Americans to their vast areas of land that to European eyes were wild and needed to be put into production.

The United States Indian policy was not genocide. Indians who became domesticated were being included within the "melting pot" of all people making up the new United States. Those Indians who wished to retain their tribal customs and ways were removed to federal territories not yet admitted as states. This gave these removed Indians more time and another chance to domesticate themselves to become citizens of what would be new states. This Indian policy lasted into the 1850's when the issues of slavery dominated all issues regarding acquisition of additional federal territorial land.

b. *Dred Scott* changed federal Indian policy from assimilating Indians into citizens to promoting permanent separation on territorial lands not subject to the Constitution.

The *Dred Scott* decision is most remembered for its positions on slavery. *Dred Scott v. Sandford*, 60 U.S. 393 (1857). What is not generally recognized is that the majority opinion of Chief Justice Roger B. Taney compared and contrasted the rights of Indians to the rights of slaves to justify its harsh statements that Negro persons could never become citizens. *Id.* at 404, 420. In *Dred Scott*, Chief Justice Taney separated the Indians from former slaves by concluding that all Indians Tribes were foreign governments.

"These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other." *Scott* at 404.

To be a foreign government, Chief Justice Taney assumed that each Indian tribe occupied its own sovereign territory.

> "The situation of this population (Negroes) was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together

> in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English or the colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it."

Id. at 403-4.

Chief Justice Taney's assumptions were utterly untrue and actually were a complete change to the integration and assimilation policy that had been the federal Indian policy accepted by the original states and applied by the United States contained in the Northwest Ordinance. For example, the Treaty of Fort Schuyler between the Oneida Indian Tribe and the State of New York ceded all of the Oneida Indians lands to the State before the Constitution was in effect. *See City of Sherrill* at 203. The Eastern States integrated the Indians that remained into American society. *See generally United States ex rel. Kennedy v. Tyler*, 269 U.S. 12, 16 (1925). In the West, all of the Pueblo Indians in New Mexico were considered citizens of the Territory of New Mexico from the moment it was formed in 1848. *See United States v. Joseph*, 94 U.S. 614 (1876). Their towns or pueblos were recognized as territorial and then state municipalities. In California, the Spanish Missions had obliterated tribal affiliations

leaving behind "Mission Indians" that were under the jurisdiction and protection of the State.

His incorrect assumptions did not prevent Chief Justice Taney from deciding as a matter of federal common law that the authority of the United States over all territories was unlimited by any act of Congress or any clause of the Constitution by declaring the Northwest Ordinance unconstitutional in the *Dred Scott* decision. *Id.* at 432, 442. Chief Justice Taney actually changed the definition of "sovereign people" from applying to all natural persons into a political classification determined by the Congress. *Id.* at 404. This change was intended to prevent Negro people as a race from ever being included within the definition of "sovereign people" or citizen. By including the Indians as a race of people capable of being domesticated but still in a state of tutelage the Chief Justice turned the protective Indian trust relationship of the Marshall trilogy into a potential unlimited federal weapon. All the Executive branch has to do is reclassify an area as "Indian country" or change the status of a group of persons to "Indians" to apply the separate unlimited territorial power unleashed in the *Dred Scott* decision. *See Holden v. Joy*, 112 U.S. 94 (1872). Chief Justice Taney's federal Indian trust is completely separate from the Constitution because the Indians are completely separate from the white society that comprises the Sovereign people.

The slavery holdings of *Dred Scott* were mostly overruled by the 13th Amendment. The separate racial classification of "Indian" was deliberately preserved in the Indian Policy of 1871 as codified in the Revised Statutes of the Reconstruction era. This codification of the Reconstruction power over Indians preserved the

territorial war powers used to fight the Civil War and to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. Even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only Congress could change his status and grant citizenship *See Elk v. Wilkins*, 112 U.S. 94 (1884).

The *Dred Scott* decision was not well received by the public. Northern States immediately moved to challenge it in the state courts that had their own sovereign authority to challenge federal laws. In a case challenging the constitutionality of the Fugitive Slave Act of 1850 that had been upheld in the *Dred Scott* decision, Chief Justice Taney again wrote the majority opinion this time removing the concurrent authority of the state courts to review federal laws to ensure they could not conflict with federal court decisions. *See Ableman v. Booth*, 62 U.S. 506 (1859). The Chief Justice admitted he had to do this to preserve his ruling in *Dred Scott*. This limitation placed on the state courts is still federal law and fundamentally shifted the federalism balance. The *Ableman* case is the reason that a state court cannot hear a constitutional challenge against any federal statute today and must defer to the federal law as preemptive. This has been partly corrected by Congress when the federal civil rights statutes were expanded after *Brown v. Board of Education*, 347 U.S. 483 (1954) to allow state court challenges for civil rights violations.

This unlimited territorial authority in Congress over the Indians was sparingly used until President Franklin D. Roosevelt used a deliberately modified version of the unlimited territorial powers for his "emergency powers" to put forward his New Deal programs. He reasoned that the Great Depression was an "emergency" and he could invoke the powers necessary to deal with that emergency just as President Lincoln had done during the Civil War. Only two New Deal programs specifically used the preserved unlimited territorial power—the Tennessee Valley Authority and the Indian Reorganization Act (IRA). *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). The IRA proposed by Indian Commissioner John Collier would have expanded the unlimited territorial authority recognized in *Dred Scott* by not only recreating separate "tribal governments" and indefinitely extending the trust period over Indian land but included provisions for a separate Indian federal court to hear Indian claims and claimed the power to remake all land in the United States into territorial land under tribal jurisdiction. When a very downsized IRA bill was passed the BIA initially treated it like it was the whole bill proposed by Collier. 25 U.S.C. § 451 *et seq.* This caused the Roosevelt Administration to further limit the use of the unlimited territorial authority when the BIA started to use the IRA against states to remove land from state jurisdiction. *See United States v. Minnesota*, 305 U.S. 382, 388 (1938). In 1940, all federal departments were prevented from acquiring state land or overriding state jurisdiction without direct approval from the Attorney General. Letter from Attorney General Jackson to Secretary of the Interior Harold Ickes, dated March 31, 1941, No.

151695, Record Group 75, Entry 132B, Departmental Memo, Box 1, BIA Orders. The IRA as passed by Congress was intended to preserve the fact that the Indians had been made full citizens of the United States in 1924. 43 Stat. 253. When the BIA used the IRA to challenge the division of fishing rights in Alaska, this Court used an equal protection position to limit it. *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949).

By the early 1960's all of the administrative restraints placed on the IRA were removed and the Nixon era of the direct promotion of tribal sovereignty began. Vice President Nixon was placed in charge of Indian affairs like all Vice Presidents since the Civil War had been. As a young lawyer Richard Nixon had worked in the Office of Price Administration Office that was responsible for setting price controls under the Roosevelt Administration during World War II. In this position he learned about using the Civil War powers and how they had been preserved. Vice President Nixon met a kindred spirit in his Indian Affairs position then working for the Department of Justice named William Veeder whose father had been a Superintendent at the Fort Belknap reservation and then a mid-level bureaucrat for the Bureau of Indian Affairs. William Veeder was a child when *Winters v. United States*, 207 U.S. 564 (1908) was made the law at the Fort Belknap reservation. Veeder had an intimate understanding of how the reserved rights doctrine was created and argued. Vice President Nixon helped convince the Eisenhower Administration to create the Civil Rights Commission following this Court's decision in *Brown v. Board of Education*.[2] William Veeder was

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[2] All of the historical facts on Richard Nixon and William Veeder have been established by careful research and can be verified upon

appointed as the attorney to represent and advise the Civil Rights Commission. Two years later he and Nixon convinced the Commission to include Indian issues. Veeder's advice to the Commission as to how to protect Indian rights was to expand the Indian policy begun by Commissioner Collier with the IRA in 1934. Veeder realized the very cut down version of the IRA that Congress finally passed was enough to unleash the unlimited territorial authority because the legislation restored the separate "tribal governments" and indefinitely extended the trust period over Indian lands. With Veeder and Nixon guiding it, the IRA brought the Indian Policy of 1871 and the *Dred Scott* rulings back into federal domestic law reinvigorating this Court's old rulings in *United States v. Kagama*, 118 U.S. 375 (1886), *Elk v. Wilkins*, 112 U.S. 94 (1884) and *Talton v. Mayes*, 163 U.S. 376 (1898). At Veeder's suggestion, the Civil Rights Commission began looking at tribal water rights. In 1959, Veeder was given permission by the Commission to intervene in the original jurisdiction case of *Arizona v. California*, 373 U.S. 546 (1963) to represent the rights of the Indian tribes along the Colorado River to protect their

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request to CERF/CERA. Many of the facts about the background of Richard Nixon are readily available on the internet. The facts about William Veeder's background were found in the Department of the Interior Library in the reports filed by his father as an employee of the BIA. The facts on what Veeder did for Nixon are mostly contained in Nixon presidential papers. The facts on the Civil Rights Commission came partly from Commission records but most came from Memorandums of Law written by Veeder to the Secretary of the Interior in the mid 1950's and into the 1960's that were requested and released to legal counsel for CERF/CERA under the Bush administration by the Department of the Interior.

reserved water rights against the States. With the change of administrations in 1961, William Veeder became the lead attorney for the United States in *Arizona v. California.*

When Richard Nixon became President in 1969, William Veeder became the special White House Counsel for Indian Affairs. Unrevealed to the federal courts and Congress, William Veeder and the President were assisting tribal groups in major Indian litigation brought by Indian tribes all over the country. President Nixon sent his Indian Message to Congress in 1970 without revealing how Veeder was working with the American Indian Movement and other groups to stir and promote the Indian issues. Veeder was concerned that what they were doing for the Indians was vulnerable to attack using the principles enunciated in *Brown v. Board of Education,* so he intentionally manipulated a case to be brought to the Supreme Court to decide whether the Indian hiring preference in the IRA was still valid. The Court not only upheld the IRA hiring preference but adopted the "political" and not "racial" language that Veeder wanted. *Morton v. Mancari*, 417 U.S. 535 (1974). With the Nixon Indian policy protected from the application of the 14th Amendment, the unlimited territorial power of the IRA could be used to expand the reach of the federal government and of the Executive branch against the States and people. *See* Nixon Memorandum at www.citizensalliance.org.

It was four years after this Court's decision in *Morton v. Mancari* that Congress passed the ICWA. The ICWA uses the IRA as the basis for the continuing need to preserve the tribal governments indefinitely. 25 U.S.C. § 1901(2). There is no reason to preserve tribal

membership unless the goal is to indefinitely preserve separate tribal governments and the power of the United States to keep them separate.

II. THIS COURT SHOULD DECLARE THE INDIAN CHILD WELFARE ACT UNCONSTITUTIONAL

a. The Indian Child Welfare Act and the case of *Morton v. Mancari*

This case represents the tragedy that modern federal Indian policy has created. This tragedy becomes very real when that policy is applied to a two year old child that happens to be 3/256ths Indian. This should be an easy decision to make--protect the rights and best interests of the child. CERF believes that this Court has an obligation not only to this little girl but to all of the children that can be labeled "Indian" to rule the ICWA unconstitutional. The reason this case is not an easy decision to make is that to do what is right for this little girl requires confronting the very basis of what modern federal Indian policy is. *Amicus* puts the history of this policy in the first section of this brief to show how this 150 year old Indian policy all goes back to one of the worst decisions this Court ever made. This Court tried for many years to introduce due process and equal protection limitations in federal Indian law without success. See *Duro v. Reina*, 495 U.S. 676 (1990) and *Rice v. Cayetano*, 528 U.S. 495 (2000).

This Court faced the possibility of effectively ending modern federal Indian policy a bit more than 40 years ago and balked at the prospect in the case of *Morton v. Mancari*, 417 U.S. 535 (1974). Instead this

Court actually upheld the very point made about the Indians in *Dred Scott* and the finding that they were separate "political" entities. The only difference in the *Morton* and *Dred Scott* rulings is that this Court in *Morton* used the separate political status of the Indians to avoid the reality of the separate racial status rather than admitting as done in *Dred Scott* that the separate political status was caused by the fact these people were racially Indians.

It was after the decision in *Morton* that Congress passed the ICWA. The policy of the ICWA is to preserve separate tribal governments by requiring that all children that can be deemed "Indian" be subject to the tribe. It is a law that makes the Indian child a "resource" of the tribe no different than a slave was a resource of its owner. Admittedly, ICWA is supposed to promote the right of an Indian child to be raised as an Indian. But today when all Americans are mixes of all kinds of different cultural backgrounds and races: why are the Indians the only ones that are required to be treated separately?

This Court lost credibility with the public for its decision in *Morton v. Mancari*. Every time this Court makes a politically expedient decision to avoid making a decision based on the fundament legal principles of our Republic, it proves that the Court is merely part of the problem of big government that is depriving individual rights and not part of a solution. Of course when the Court does uphold the fundamental principles to protect individual rights as it did in *Brown v. Board of Education* or more recently in *Hamdan v. Rumsfeld*, 585 U.S. 557 (2006), the public may first react with surprise at the changes the new standard causes but it does not usually take long before the public

understands that the Court has placed individual rights and constitutional principles before politics. These decisions increase the credibility of the Court.

To declare the ICWA unconstitutional this Court must first overrule the case of *Morton v. Mancari*. Of all of the cases set up by William Veeder, Morton is the one that has had the most impact. Veeder engineered the "political" rather than "racial" issue presented in the suit knowing it was not a truthful presentation to this Court. The DOJ itself had concluded that the Indian preferences could not be characterized as anything but racial. DOJ Memorandum of Law regarding *Morton v. Mancari* from Philip S. Fuaco to Carlton R. Stoiber dated June 22, 1973. Not only did Veeder engineer the *Morton* legal theory and work with the BIA, he influenced the young New Mexico attorney representing the white BIA employees with the help of the newly elected Senator Pete Domenici to argue the case as Veeder recommended to insure that this Court would accept the "political relationship" language to avoid applying the 14th Amendment to the IRA hiring preferences.

Overruling *Morton* means ending separate tribal sovereignty and having to explain why it is wrong. *Amicus* proposes a different kind of remedy because any decision activating the 14th Amendment equal protection clause directly to any significant part of this Indian policy like ICWA could cause the end of the whole of Title 25 of the United States Code and create a significant confrontation with the elected branches. This Court can overrule *Morton* and ICWA simply by reinterpreting the meaning of "sovereign people" to give it vitality for the 21st Century and beyond. *Amicus* CERF is suggesting that this case requires more than

just a reiteration of the principles elucidated in *Brown* because that decision is now almost 60 years old. To prevent Congress and the Executive from trying to use the territorial war powers to block this Court's decision means this Court must sufficiently articulate why it is inherently important to have all children in the United States grow up with equal rights and the promise that they will be free to live their lives as Americans with rights that no government can infringe. The new definition of "sovereign people" can also acknowledge the technologies that can now determine by DNA whether someone is part Indian or record minute details about heritage for national security or even just health insurance purposes.

Making a new definition of sovereign people also accomplishes another purpose. It gives this Court the opportunity to explain why each individual must be considered a "sovereign" in their own right. This Court can explain that this does not require tribal members to give up their tribal heritage or affiliations. It just means that the United States policy to keep them separated from all other Americans is wrong. This is a holding and rationale that neither the Congress or the Executive branch can attack because either branch would have to claim the authority to keep Indians and Indian tribes separate from the sovereign people. The simple reality that this would require the elected officials to argue that the *Dred Scott* decision was correctly decided and should still be the law is probably enough all by itself to stop Congress and the President from trying to undo this Court's decision.

By giving a new definition to "sovereign people" that restores the Framer's essential view but encompasses enough substance to declare the ICWA

unconstitutional will not prevent Congress from creating an affirmative action program for the Indians who are still living in poverty across this nation. The federal Indian policy of promoting tribal sovereignty has failed the great majority of Indians living on reservations or trying to make a living in an urban environment. No child should be forced because of their race to live in poverty. The ICWA has forced this result on many children. This is a sub-issue in this case because of the differences in the standard of living of the adoptive couple that wish to adopt this child and the financial status of the natural father and his parents that can provide essentials but not nearly as much opportunity to this little girl. The state courts acknowledge these financial differences by making this one factor in determining what is in the best interest of every child in a custody proceeding. By not changing the interpretation of the 14th Amendment Equal Protection Clause this balanced approach can continue to evolve. This is also true for affirmative action law as well.

Lastly, expressly holding that all Native Americans are included in the definition of "sovereign people" does not require this Court to overturn prior case law based on the Indian Commerce Clause or cause all of Title 25 to be nullified. The fact that Indians and Indian tribes were treated separately before they were expressly included within the new definition of sovereign people just becomes a historical fact just as the Jim Crow laws are today. It will likely be easier to enforce this change than it was to enforce the myriad of changes in state and federal law created by *Brown v. Board of Education*. In this case, all that cannot continue are statutes like ICWA that create rights in

separate tribal governments. Because all of the other laws of the United States will still apply there should be little disruption. For example, many Indian people will still be residing on federal public lands reserved for their use. If the Indians are part of the sovereign people then those public lands are under the jurisdiction of the United States and cannot be classified as separate territories to remove their constitutional rights. *See Rasul v. Bush*, 542 U.S. 466 (2004). Some functions performed by tribal governments will have to go back under the national government or state governments. But this Court does not need to sort this out. Congress and the Executive Departments will have to sort it out and this Court can review what they decide if individuals effected by the determinations are unhappy enough to file a lawsuit. This is even true in handling Indian treaty claims. The elected branches and administrative departments can and should make the initial determinations.

b. The ICWA Impermissibly Interferes With the State Courts and the Judicial Review Authority of this Court under Article III.

If Congress can write the laws that state courts must apply than Congress and not this Supreme Court has the power to determine the appropriate federalism balance. When Congress writes a law that can only be enforced in a state court it renders itself completely unaccountable for the law it has made. This case is a perfect example because it is the state court of South Carolina that is being blamed for harming this child and not the Congress. The United States is not even a party

to this case. No government elected or otherwise likes being held judicially accountable but for our Republic to continue the People must be able to hold the proper government accountable for the harms they legislate. See *New York v. United States*, 505 U.S. 144 (1992). The ICWA breaks down the federalism barricade between the Congress and the state courts because any child can be classified as an "Indian" at any time in a custody proceeding as happened in this case. If a child is suddenly determined to be an "Indian child" then ICWA federally preempts the state child custody laws through the Indian Commerce Clause as expanded by the unlimited territorial war powers as explained above. As has been quite ably argued by the Adoptive Parents and GAL in their opening briefs, the ICWA deprives the adoptive parents and the little girl of their due process and equal protection rights in the state courts of South Carolina. It also deprives the child of the best interest test developed by the state courts.

There is no question that Congress can limit the subject matter jurisdiction of the lower federal courts except to deny any possible judicial remedy. *See Marbury v. Madison*, 5 U.S. 137 (1803). Tribal and territorial courts are Article I courts under the direct control of Congress. *See Talton v. Mayes*, 163 U.S. 376 (1898). Just like Article I of the Constitution allows Congress to directly control the subject matter jurisdiction of the territorial courts, persons who live in the territories also have their constitutional rights determined by Congress. *See* Indian Civil Rights Act of 1968, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). This worked because when a state was admitted to the Union the people residing in the new state became subject to all of the rights in the federal

constitution as well as their new state constitutions. Keeping the Indians separated from the sovereign people and state jurisdiction has broken down the federalism structure that was based on this simple process of making states out of territories. If the Indians are held to be included in the "sovereign people" then they are no longer considered to be living in separate territories with rights that can be set by Congress. This should mean that Congress can no longer force the state courts to act as territorial courts subject to the control of Congress just because an Indian is a party to the state court action. Declaring ICWA unconstitutional because the Indians must be included as part of the sovereign people also restores the role of the state courts within the federalism structure.

The federal constitutional structure deliberately preserved the states as separate sovereigns in control of their own governmental functions. This is the basis of federalism. One of the most important state functions is the operation of the state courts that innovate and create common law. *See Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). It is the state courts that protect the liberty interests of the sovereign people. This is why this Court has developed abstention doctrines to prevent federal court subject matter jurisdiction on matters that are intrinsically better suited to being decided in the local courts closest to the people they serve. For purposes of this case it is the Domestic Relations Exception that has necessitated Congress legislating a law that compels the state courts to treat Indian children differently than all other children. Because "state court orders" issued pursuant to ICWA do not derive from state authority but instead require

the state courts to apply the federal requirements, ICWA impermissibly interferes with federalism and must be declared unconstitutional.

Federalism by definition requires that state courts be authorized and act within the state governmental structure which is supposed to be subject to but separate from the federal government structure. The legislature of each state should be writing the laws that determine the jurisdiction and procedures for that state's courts. This allows each state legislature and state judicial branch to develop different and sometimes innovative applications of law to protect individual rights and solve vexing social issues presented in a case. This also means that the federal legislature, Congress, is not supposed to be able to write laws that state courts are compelled to apply.

The choice of law applied in a specific case is one of the main factors that may affect the outcome of that case. Choice of law is one of the aspects of a case that is directly subject to appellate judicial review. The choice of the South Carolina Supreme Court to apply ICWA when this father does not clearly meet the definition required in ICWA to be a parent is a major point of the Adoptive Couple's opening brief. This United States Supreme Court has final appellate judicial review authority over all state court decisions as contained in Article III of the constitution. See 28 U.S.C. § 1257. Article III is the only section of the constitution that gives direct authority over States to any branch of the national government. It is this provision that sets the role of the States as subject to the constitution but empowered to act as separate sovereigns. It is a matter for this Court to ultimately determine whether the choice of law made in a state court was correct under its

judicial review authority. This deliberate structural balance contained in Article III is the core principle of federalism. Congress cannot write a law like ICWA that compels the state courts to apply that federal law without violating the separation of powers between itself and this Court. Congress is asserting that ICWA is preemptive even in this Court because of their plenary authority over Indians. ICWA is only preemptive to remove this Court's ultimate authority to judicially review the choice of law made by the state courts of South Carolina if the Indians are still wards living in separate territories of the United States subject to plenary authority and not part of the sovereign people entitled to equal rights. This Court has already ruled that when Congress overextends the Commerce Clause to apply in specific areas that this Court has the authority to declare the law unconstitutional. *See United States v. Lopez*, 514 U.S. 549 (1995). It is the decision of this Court whether Congress has the authority to compel a state court to apply a federal law. *See also Ableman v. Booth*, 62 U.S. 506 (1859). This Court can assert its authority under Article III and rule the ICWA unconstitutional for overextending the Commerce Clause and violating federal separation of powers and federalism. This Court and not Congress or the Executive must be the branch of the federal government ultimately empowered to preserve the constitutional structure that includes the federalism balance that protects the rights of all the people.

Congress in the ICWA has made a law and set federal requirements that the state courts must apply. The ICWA cannot apply in the federal courts because the Domestic Relations Exception prevents federal

courts from ever hearing a child custody case. *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). If Congress can write laws that the state courts must apply what stops Congress from removing all due process and equal protection rights from all individuals in the state court proceedings when Congress determines that some national interest is implicated? This is exactly what the ICWA does, it determines that preserving tribal governments is more important than protecting the individual rights of this child. Upholding the authority of the Congress to adopt laws to be specifically enforced by the state courts like ICWA means that Congress can legislate other requirements for how state courts are to conduct all child custody proceedings. What if Congress adopts a law that says any parent who is not current on their federal taxes cannot have custody of their child? Or Congress decides that if a parent belongs to a certain political party that questions the authority of the national government they cannot have custody? A person affected by any of these possible federal laws has no recourse because the state courts cannot hear a constitutional challenge to these laws under *Ableman v. Booth*. The federal courts also may not be able to review these possible federal laws because of the Domestic Relations Exception and other abstention doctrines that protect state court orders from being reviewed in the federal courts. This is not just conjecture. This is happening every day to parents classified as "non-custodial" to enforce the federal child support mandates of the Social Security Act, Temporary Assistance to Needy Families Title IV-D program, in the state courts.

III. THERE MUST BE A REMEDY THAT PROTECTS THE CONSTITUTIONAL RIGHTS OF THIS BABY GIRL

The Guardian ad Litem (GAL) appointed by the South Carolina trial court raised the issues of the constitutionality of ICWA and its effect of depriving this baby girl of the right to have her best interests be the standard for deciding the custody dispute over her throughout the proceedings in the state courts and continues to raise them in her opening brief. This child is 3/256ths Indian. But the fact she has this tiny fraction of Indian heritage has led to her being classified as an Indian child for purposes of the ICWA. Whether or not this classification can be politically justified it does not change the fact that being classified an Indian is a race based classification.

The fact she has been racially classified as Indian also allows this child to become the "resource" of an Indian tribal government not subject to the constitution of the United States. The tribal government is not subject to the constitution because the land it occupies is deemed to be a territory of the United States not subject to the constitution. Not only was this child removed from the only parents she had ever known, her birthright as an American was also removed. This little girl was denied the rights of being an American entitled to the protections and guarantees of due process and equal protection in a state court because she only has the rights of someone who resides in a territory of the United States as if she was physically residing on the tribe's reservation.

In *Rasul v. Bush*, 542 U.S. 466, 480-4 (2004) this Court did not accept the declaration of the military and

the Executive that the Guantanamo Bay Naval Station was separate "territory" not under the direct control of the United States. This holding allowed this Court to determine whether the prisoner (and all other prisoners) accused of terrorism held at the Naval Station by officials of the United States was entitled to the protections of the Constitution of the United States. How can this Court not at least do the same for this child?

It is time for this Nation to put behind us the legal and political manipulations and mistakes that happened over slavery. The issue of whether slavery was constitutional divided this nation and caused the Civil War. Because the slavery fight began twenty years before the first bullet was fired at Fort Sumter and at least in application to the Indians has never ended, the political changes of that fight can still reach out and affect the rights of every American as this case aptly demonstrates. This Court can finally end the slavery political manipulations by defining that every child born in the United States, including every child that has Indian heritage, is one of the "sovereign people" with the equal constitutional rights enjoyed by every American within the jurisdiction of the United States. There is no way to go back and change what happened in the fight over slavery but we can go forward into the nation envisioned by President Abraham Lincoln with equal rights for all.

As the 10th Amendment indicates, a ruling that protects the rights of the people often will also protect the sovereignty of the states. By ending the "territorial land status" of the Indians, the federal government will lose the claimed authority to alter the jurisdiction of the states after statehood. This has been one of the largest

threats to the constitutional structure of federalism from the Nixon Indian Policy. This court has already reinstated its judicial review authority over the status of land to protect the sovereignty of the State of Hawaii in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) and can now do the same to protect all of the states and this little girl from being deprived of her constitutional rights.

CONCLUSION

This Court should declare the ICWA unconstitutional and also declare that this baby girl and all persons of Indian descent are part of the sovereign people to reverse and remand the decision of the South Carolina Supreme Court.

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AMICUS CURIAE BRIEF

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BRIEF OF *AMICI CURIAE* CURRENT AND FORMER MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE* [1]

Senator James Abourezk of South Dakota served in the U.S. Senate from 1973 until 1979, and during that time initiated the creation of the predecessor to the Senate Committee on Indian Affairs and served

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward the preparation or submission of this brief. On February 11 and 19, 2013, all parties filed letters with the Clerk of Court reflecting their blanket consent to the filing of *amicus* briefs.

as its first chairman. He also served as the chairman of the American Indian Policy Review Commission, and he sponsored the Senate version of the bill that became the Indian Child Welfare Act ("ICWA").

Senator Daniel Akaka of Hawaii served in the U.S. House of Representatives from 1976 until 1990 when he became a U.S. Senator, a position he held until 2013. In 2011, Senator Akaka became the Chairman of the Senate Committee on Indian Affairs.

Senator Mark Andrews of North Dakota served in the U.S. House of Representatives from 1964 until 1981 when he became a U.S. Senator, a position he held until 1987. Starting in 1983, Senator Andrews served as the Chairman of the Senate Committee on Indian Affairs.

Senator Max Baucus of Montana served in the U.S. House of Representatives from 1975 until 1978 when he became a U.S. Senator, a position he holds today. As a Representative, Senator Baucus co-sponsored the House version of the bill that became ICWA.

Senator Maria Cantwell of Washington has served in the U.S. Senate since 2000. She is the current Chairwoman of the Senate Committee on Indian Affairs.

Senator Byron Dorgan of North Dakota served in the U.S. House of Representatives from 1981 until 1992 when he became a U.S. Senator, a position he held until 2010. Starting in 2007, Senator Dorgan served as the Chairman of the Senate Committee on Indian Affairs.

Senator John Melcher of Montana served in the U.S. Senate from 1977 until 1989. He served as the Chairman of the Senate Committee on Indian Affairs from 1979 to 1981.

Senator Ben Nighthorse Campbell of Colorado served in the U.S. House of Representatives from 1987 to 1993 when he became a U.S. Senator, a position he held until 2005. Senator Nighthorse Campbell served as Chairman of the Senate Committee on Indian Affairs from 1997 to 2001, and again from 2003 to 2004. He is an enrolled citizen in the Northern Cheyenne Tribe.

Representative Michael Blouin of Iowa served in the U.S. House of Representatives from 1975 until 1979. Representative Blouin co-sponsored the House version of the bill that became ICWA.

Representative Yvonne Burke of California served in the U.S. House of Representatives from 1973 until 1979. Representative Burke co-sponsored the House version of the bill that became ICWA.

Representative Milton Robert Carr of Michigan served in the U.S. House of Representatives from 1975 to 1981, and again from 1983 to 1995. Representative Carr co-sponsored the House version of the bill that became ICWA.

Representative Donald Fraser of Minnesota served in the U.S. House of Representatives from 1963 until 1979. Representative Fraser co-sponsored the House version of the bill that became ICWA.

Representative Robert J. Lagomarsino of California served in the U.S. House of Representatives from 1974 until 1992. Representative Lagomarsino was the Republican Floor Manager when the House voted on ICWA, and he spoke in favor of the House bill that became ICWA.

Representative Edward J. Markey of Massachusetts has served in the U.S. House of Representatives

since 1976. Representative Markey currently serves as the Ranking Democratic Member on the Committee on Natural Resources, the committee in the House with primary authority over Indian affairs. Representative Markey has led an ongoing congressional inquiry into State compliance with ICWA since 2011.

Representative George Miller of California has served in the U.S. House of Representatives since 1975. From 1991 through 1994, Representative Miller served as the Chairman of the Committee on Natural Resources. Representative Miller co-sponsored the House version of the bill that became ICWA.

Governor Bill Richardson of New Mexico served in the U.S. House of Representatives from 1983 until 1997. From 1993 to 1994, Governor Richardson served as the Chairman of the Committee on Natural Resources. He was subsequently elected Governor of New Mexico in 2002, a position he held until 2011.

Representative Don Young of Alaska has served in the U.S. House of Representatives since 1973. From 1995 to 2000, Representative Young served as the Chairman of the Committee on Natural Resources.

These former and current members of Congress, all of whom have taken an active role in legislation concerning Indian affairs, have a collective interest in the issues raised in this case because those issues implicate Congress's exclusive authority to legislate concerning Indian affairs, as well as the ability of Congress to effectuate the United States's duties and obligations as trustee of the Indian tribes and their peoples.

SUMMARY OF ARGUMENT

For hundreds of years, pursuant to its constitutional authority, Congress has enacted legislation targeted at Indian tribes and their enrolled citizens. This Court long ago recognized that Congress is the branch of the federal government with both the power and the duty to define the relationship between the United States and tribal nations. In 1978, Congress enacted the Indian Child Welfare Act ("ICWA") in direct response to state adoption policies that were draining Indian tribes of their future citizens. Such practices threatened the very existence of Indian tribes. Without children to grow up as their citizens, tribes would be left with no one to speak their language, carry on their traditions and culture, or participate in their tribal governments. Congress's purpose in enacting ICWA was to ensure the continued sovereign and political existence of the Indian tribes.

ICWA constitutes a constitutional exercise of Congress's exclusive authority over Indian affairs derived from the Constitution and from its historical duties as trustee. This Court has never found that any congressional act directed toward Indian tribes and their enrolled citizens violates either the Tenth Amendment or equal protection principles. Instead, this Court has repeatedly concluded that, when Congress uses the classification of "Indian" to signify membership in a federally recognized tribe, such classifications are political, not racial. In this instance, ICWA's narrow definition of "Indian child" makes the application of ICWA contingent upon citizenship in a tribe. Because the Act requires that either the child or the parent be an enrolled citizen of

the tribe, ICWA's classification constitutes a political, not racial, classification.

Ultimately, any decision limiting Congress's authority to pass legislation like ICWA, or prohibiting Congress from relying on the word "Indian" to signify membership in a federally recognized tribe, would effectively preclude Congress from exercising its plenary authority in Indian affairs, and render Congress unable to fulfill its historic duties as trustee to the Indian tribes. The facts of this case present poignant and wrenching circumstances, but that should not result in an erosion of Congress's power to enact legislation designed to promote tribal self-government and preserve the continued existence of tribes as sovereign, political communities.

ARGUMENT

I. CONGRESS ENACTED ICWA IN ORDER TO PRESERVE THE CONTINUED SOVEREIGN, POLITICAL EXISTENCE OF INDIAN TRIBES

In the mid-1970s, Congress became aware of a crisis involving the separation of Indian children from their families and tribes that, because of its magnitude, threatened the very existence of Indian tribes as self-governing, political communities. Congressional inquiry over several years demonstrated the severity of the problem: a large percentage of Indian children—one-quarter to one-third—were being adopted or placed in foster care families outside of the Indian tribes; state adoption policies provided little to no protection for maintaining the tribal affiliations of these adopted Indian children; and the loss of millions of acres of tribal lands at the turn of the twentieth century rendered the continued existence

of an Indian tribe's sovereign identity dependent on the tribe's ability to maintain its future generations of citizens—citizens who would learn the tribe's language, practice its traditions, and participate in its tribal government, regardless of whether they lived on or off a reservation.

After "over 4 years of congressional hearings, oversight, and investigation" conducted during three sessions of Congress, Congress concluded that "Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people [have been] placed in jeopardy." 124 Cong. Rec. 38101-02 (1978) (remarks of Rep. Morris Udall, principal sponsor of ICWA); *see also* H.R. Rep. No. 95-1386, at 27 (1978). Congress accordingly enacted ICWA, Pub. L. 95-608, 25 U.S.C §§ 1901-1963, as a remedy to these problems, finding that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," 25 U.S.C. § 1901(3), and that Indian tribes would likely cease to exist as sovereign, political entities absent congressional intervention. Rep. Robert J. Lagomarsino explained: "This bill is directed at conditions which . . . threaten . . . the future of American Indian tribes. . . ." 124 Cong. Rec. 38102 (1978). Congress's enactment of ICWA responded directly to such harms as identified in the legislative record.

A. ICWA Arose From Congress's Awareness That High Adoption Rates For Indian Children Threatened Tribal Sovereignty

As this Court previously has noted, ICWA resulted from "rising concern in the mid-1970's over the consequences to Indian children, Indian families, and

Indian tribes of abusive child welfare practices." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1988). As early as 1973, the Senate subcommittee on Indian affairs "began to receive reports that an alarmingly high percentage of Indian children were being separated from their natural parents through the actions of nontribal government agencies." S. Rep. No. 95-597, at 11 (1977). Over three congressional sessions, both the Senate and the House held hearings on this crisis with testimony "from the administration, Indian people, State representatives, tribal leaders, medical and psychiatric professionals and child welfare groups." *Id.* at 12; H.R. Rep. No. 95-1386, at 27-28. Congress also established the American Indian Policy Review Commission, which in turn established a task force (Task Force IV), that addressed, *inter alia*, issues of Indian child welfare, resulting in a published report in 1976. Task Force Four: Federal, State, and Tribal Jurisdiction, *Report on Federal, State, and Tribal Jurisdiction, Final Report to the American Indian Policy Review Commission*, 2 (Comm. Print 1976) [hereinafter "Task Force Report"].[2] Based upon the findings and recommendations of this and other task forces, the American Indian Policy Review Commission submitted a report to Congress in 1977. American Indian Policy Review Commission, *Final Report* (Comm. Print 1977) [hereinafter "Commission Report"].

Congress's examination of the crisis confirmed that Indian children were far more likely to be removed from their families (and, as a result, their tribes)

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[2] The task force considered a large quantity of evidence over 28 days of hearings that included 250 witnesses and 3,000 pages of exhibits and submissions. Task Force Report at 2.

than other children. During the Senate hearings in 1974, one witness described "[t]he wholesale removal of Indian children from their homes" as "the most tragic aspect of Indian life today." *Indian Child Welfare Program Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. 3 (1974) [hereinafter "1974 Hearings"]. The evidence presented to Congress during the 1974 hearings revealed that "25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Holyfield*, 490 U.S. at 32. Furthermore, "[t]he adoption rate of Indian children was eight times that of non-Indian children" and "[a]pproximately 90% of the Indian placements were in non-Indian homes." *Id.* at 33.

The legislative record reflected "considerable emphasis on the impact on the tribes themselves of the massive removal of their children." *Id.* at 34; *see also id.* at 49. Congress heard from several tribal leaders "that [thei]r children are [thei]r greatest resource, and without them [tribes] have no future." *Indian Child Welfare Act of 1978: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 78 (1978) [hereinafter "1978 Hearings"] (testimony of Puyallup Tribe official). As the congressionally established task force recognized, "[c]hild rearing and the maintenance of tribal identity are essential tribal relations." Task Force Report at 86 (citation and quotation omitted). The large number of Indian children placed with families outside their tribes "paralyz[ed] the ability of the tribe to perpetuate itself." *Id.*; *see also id.* at 78-79 ("One of the most pervasive components of the various

assimilation or termination phases of American policy has been the notion that the way to destroy Indian tribal integrity and culture, usually justified as 'civilizing Indians,' is to remove Indian children from their homes and tribal settings.").

The congressional record also reflected concern over state adoption policies and practices that made little or no attempt to preserve a child's membership in a tribe. Testimony from numerous tribal leaders highlighted the ways in which individual States had denied tribes' sovereign interest in preserving their future generations.[3] As one Chief noted, many of the state authorities deciding the placement of adopted Indian children had "no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing." 1978 Hearings at 191-92. Such officials lacked an understanding that "[a]n Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family." *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 316 (1977) [hereinafter "1977 Hearings"].[4]

Despite this strong Indian tradition, however, non-tribal authorities often refused even to consider placement within the Indian child's tribe. 1977 Hearings at 175 (testimony on behalf of Mississippi band of Choctaw Indians that "Mississippi, through

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[3] *See, e.g.*, 1978 Hearings at 207 (testimony on behalf of the Navajo Nation that "our history is filled with overzealous acts by states and other non-tribal agencies who unjustly take many Navajo children away from their homes").

[4] *See also* 1978 Hearings at 110 ("[T]here are no words in the . . . Indian language, . . . for an illegitimate child [and] . . . no word or definition for an orphan [] because of the extended family. . . .").

its adoption policy, will not allow Choctaw families to adopt Choctaw children").[5] In the view of members of Congress, the refusal of many States to place Indian children in the homes of their extended Indian families threatened the Indian tribes' continued existence as self-governing communities. *See, e.g.*, H.R. Rep. No. 95-1386, at 19 ("Contributing to this problem has been the failure of State officials, agencies, and procedures to take into account the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future."). As the Task Force found, "the intrusion of a State in family relationships within the [Indian] Nation and the interference with a child's ethnic identity with the tribe of his birth are ultimately the most severe methods of undermining retained tribal sovereignty and autonomy." Task Force Report at 86 (citation and quotation omitted).

Furthermore, the legislative record confirms that Congress was aware that a tribe's loss of its future citizens was a problem existing "both among reservation Indians and off the reservation in urban communities." 1978 Hearings at 191. Historic policies had extinguished Indian tribes' former land-based ways of life and economic self-sustenance. Consequently, many tribal citizens had to "move back and forth from a reservation dwelling to border communities or even to distant communities [to search for] employment and educational opportunities." Commission Report at 86; *see also* 1978 Hearings at 113 (stating that more "than 60 percent of all North American Indians live off-reservation"). These findings led the

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[5] *See also* 1974 Hearings at 135 (testimony that the North Dakota Attorney General refused to place Indian children in foster homes on reservations in North Dakota).

congressional commission to include in its report a recommendation that legislation contain provisions to ensure that, "[w]here an Indian child is not domiciled on a reservation and subject to the jurisdiction of non-Indian authorities, the tribe of origin of the child shall be given reasonable notice before any action affecting his/her custody is taken." Commission Report at 35, 423.

At the same time, Congress recognized that, as a result of the Dawes Act, Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, the federal government had removed millions of acres of land from tribal governments and ceded them to States and settlers. *See* S. Rep. No. 95-597, at 16 (acknowledging that "Federal allotment . . . at the turn of the century" greatly reduced Indian lands).[6] Thus, in considering the enactment of ICWA, Congress was faced with the fact that Indian land holdings had been reduced by nearly 90 million acres between 1887 and 1934. Commission Report at 67, 318. Congress therefore acknowledged that any legislation limiting an Indian tribe's sovereign interest in its future citizens to those still living on tribal lands would effectively preclude a tribe from ensuring its continued existence as a distinct, political community.[7] Instead, the congressional com-

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[6] *See* Task Force Report at 112 ("In response to extreme pressure from whites for access to Indian lands and mineral riches, Congress passed the General Allotment Act of 1887.").

[7] In response to the realization that Federal allotment threatened the continued existence of tribes, "the policy of allotting Indian lands was repealed with the passage of the Indian Reorganization Act." Task Force Report at 112, n.11. In this regard, "[t]he Indian Reorganization Act of 1934 marked a shift away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture," including

mission concluded that a tribe's sovereign interest in a future citizen must be "based on the tribal status of the individual rather than the mere geography of the child." Task Force Report at 86. Accordingly, ICWA effectuates the congressional understanding that "the tribal relationship is one of *parens patriae* to all its minor tribal members"— gardless of where they live. *Id.*

B. ICWA Reflects Congress's Considered Remedy For The Threat Facing Indian Tribes

Congress's primary goal in enacting ICWA was to preserve "the continued existence and integrity of Indian tribes." 25 U.S.C. § 1901(3); *see also* 124 Cong. Rec. 38103 (1978) (statement of Rep. Robert J. Lagomarsino reading letter of Rep. Morris Udall: "I firmly believe that the future and integrity of Indian tribes and Indian families are in danger because of this crisis."). Accordingly, Congress sought in ICWA "to establish minimum federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe." H.R. Rep. No. 95-1386, at 19.

The provisions of ICWA reflect Congress's careful and balanced approach to setting those standards. *First*, out of recognition that a tribe's ability to maintain its sovereign existence depends on its future citizens, Congress created a definition of "Indian child" that makes ICWA's application contingent

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promoting tribal self-government. *Id.* (citation and quotation omitted); *see also United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2327 n.8 (2011). ICWA constitutes one result of this shift away from assimilation and toward tribal self-government.

upon tribal citizenship. *See* 25 U.S.C. § 1903(4). *Second*, because Congress found that a tribe's sovereignty depends upon the preservation of extended Indian family relationships within the tribe, Congress crafted provisions designed to ensure that a court's first attempt to place an adopted Indian child is with a member of her extended family. *See* 25 U.S.C. § 1915(a). *Third*, understanding the complex history surrounding Indian lands, Congress created provisions that not only recognize a tribe's inherent jurisdiction concerning the placement of an Indian child domiciled on a reservation, but also afford tribes jurisdictional and procedural rights in proceedings involving children not domiciled on a reservation where the parents' rights have been voluntarily relinquished or terminated by a State. *See, e.g.*, 25 U.S.C. § 1911.[8]

1. Congress Defined "Indian Child" In Light Of The Link Between Tribal Citizenship And Sovereignty

Understanding that the preservation of tribal self-government derives from the preservation of a tribe's future citizens, Congress made ICWA's definition of "Indian child" contingent upon tribal citizenship. *See* 25 U.S.C. § 1903(4).[9] Thus, for ICWA to apply, either the child must already be an enrolled citizen at the time of the state proceedings, or the child's parent

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[8] Furthermore, Congress broadly defined "reservation" to include all trust and restricted land, making ICWA applicable to all Indian children on tribal lands, regardless of reservation boundaries. *See* 25 U.S.C. § 1903(10).

[9] 25 U.S.C. § 1903(4) defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."

must be an enrolled citizen *and* the child herself must be eligible for citizenship under her tribe's unique citizenship requirements. *See id.* This limited definition confirms the congressional purpose behind ICWA: in instances where a child is already a citizen, or is eligible for citizenship and her parent has elected to maintain his citizenship, then the child's tribe has a sovereign, political interest in where that child is placed.

This definition of "Indian child" stems from Congress's consideration of testimony from tribal leaders who confirmed that, without a future generation of citizens, tribal governments would have no means by which to transfer their culture, heritage, language, or civic duties such as voting and participation in self-governance. Indeed, without citizens, tribes have no future leaders; without future leaders, tribes have no self-government. *See* 1978 Hearings at 193 (testimony that adoption practices that place tribes' future citizens outside of tribal communities "seriously undercut the tribes' ability to continue as self-governing communities"). For this reason, application of ICWA is contingent upon membership.

In constructing ICWA, Congress remained cognizant that, "for an adult Indian, there is an absolute right of expatriation from one's tribe." H.R. Rep. No. 95-1386, at 20 (citing *U.S. ex. rel. Standing Bear v. Crook*, 25 Fed. Cas. No. 14891 (1879)). Thus, in ICWA, Congress recognized that a child's parent could terminate voluntary tribal membership at any time. For this reason, Congress intentionally refrained from extending ICWA's application to children who are eligible for citizenship in a tribe, but whose parents have elected to terminate their citizenship with the tribe or simply never enrolled. *See*

25 U.S.C. § 1903(4)(b). For non-enrolled children, ICWA extends only to those whose parent has maintained citizenship in the tribe, thereby manifesting a voluntary intention to contribute to the preservation of the tribe's sovereign identity. *Id.*

ICWA's definition also excludes children who themselves are not eligible for citizenship, despite the fact that one or both of their parents may be. *See* 25 U.S.C. § 1903(4). In excluding such children, Congress refrained from imposing its own definition for membership in a federally recognized tribe, demonstrating respect for this Court's decision that "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Consequently, Congress's definition of "Indian child" in ICWA recognized that Congress's authority over Indian affairs extends only to individuals who meet the individual tribes' unique, political qualifications for membership.

2. Congress Deemed Preserving Family Relationships Essential To The Tribes' Continued Existence

ICWA also evinces Congress's determination, stemming from evidence in the legislative record, that the preservation of family relationships based on tribal identity is essential to maintaining the tribes' continued sovereign existence. Congress sought to preserve family relationships as a means of preserving tribal sovereignty.

During its inquiry into the crisis, Congress discovered that the "family relationships" that serve as the foundation for citizenship and tribal sovereignty

in tribal communities extend beyond the parent-child relationship and include the dozens of relatives "counted as close, responsible members of the family." 1974 Hearings at 18. However, as the House Report concluded, the "dynamics of Indian extended families are largely misunderstood" by States and nontribal authorities that insist on placing Indian children in non-Indian homes outside of their tribe. H.R. Rep. No. 95-1386 at 10.

With this understanding, Congress designed ICWA to protect the parent-child relationship as an aspect of the child's relationship with the tribe. For instance, Section 1912(f) sets a higher standard for the termination of parental rights, and Section 1913(a) requires that any voluntary consent to termination of parental rights be executed in writing and recorded before a judge of a "court of competent jurisdiction," who must certify that the terms and consequences of the consent were fully explained and understood. The parental termination provisions found in these sections serve ICWA's broader purpose that, "where possible, an Indian child should remain in the Indian community." *Holyfield*, 490 U.S. at 37. Maintaining these family-based relationships provides a means through which to foster a child's relationship with her tribe. *In re A.J.S.*, 204 P.3d 543, 547-49 (Kan. 2009) (explaining that *Holyfield* "underscored the central importance of the relationship between an Indian child and his or her tribe, independent of any parental relationship").

Congress further determined that, in situations where the biological parents' rights to the child have been terminated—whether the termination was voluntary or involuntary—the Indian child's extended family should be the *first* place that the state looks in

searching for a placement that is in the best interest of the child. *See* 25 U.S.C. § 1915(a) ("[P]reference shall be given . . . to a placement with (1) a member of the child's extended family. . . ."). If good cause exists to prevent this placement, then state courts must look to place the child with "other members of the Indian child's tribe," and, if a suitable home within the tribe is not available, then preference is given to placement in "other Indian families." *Id.* Section 1915 ties directly to the evidence before Congress indicating that tribal citizenship is best preserved within the context of an extended Indian family.

Sections 1912 and 1915 show that Congress designed ICWA to apply beyond the limited circumstances in which an Indian child was removed from the home of an Indian parent or family. Rather, the procedural mechanisms of ICWA apply anytime an Indian child is put up for adoption, regardless of the child's individual circumstances.[10] In this regard, Sections 1912 and 1915 "recognize[] that the Federal trust responsibility and the role of Indian tribes as *parens patriae* extend to all Indian children involved in all child custody proceedings." S. Rep. No. 104-335, at 14 (1996).[11] Together, these provisions ensure that

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[10] *See* S. Rep. No. 104-335, at 14 (1996) ("When the ICWA was enacted, . . . Congress intended . . . to provide for tribal involvement with, and Federal protections for, all children defined by their tribes as members or eligible for membership who are involved in any child custody proceeding, regardless of their individual circumstances.").

[11] Congress designed ICWA so that its application would hinge solely on membership in a federally recognized tribe as defined by "tribal laws and constitutions" because "[s]tate courts are poorly equipped to make fundamental determinations of

"the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society," H.R. Rep. 95-1386 at 23, are protected in all adoption proceedings concerning the placement of Indian children.

3. Congress Enacted Procedural Mechanisms To Protect The Tribes' Sovereign Interest In Their Minors' Membership

ICWA also addressed the jurisdictional concerns embedded in the crisis before Congress. Based on a 1976 decision of this Court, Congress recognized that "[t]he exclusive jurisdiction of the tribe [over the adoption placements of its children] is well founded in the law." S. Rep. No. 95-597, at 17 (citing *Fisher v. District Court*, 424 U.S. 382 (1976)). ICWA thus contains not only "procedural and substantive standards for those child custody proceedings that do take place in state court," *Holyfield*, 490 U.S. at 36, but also procedural rights meant to protect the Indian tribe's inherent sovereign jurisdiction over the placement and legal status of its own members, both on and off the reservation, *see id.* at 49.[12]

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tribal membership and tribal affiliations." S. Rep. No. 104-288, at 4 (1996).

[12] ICWA affords Indian tribes certain rights that are purely procedural and jurisdictional in nature. *See Holyfield*, 490 U.S. at 49 (citing §§ 1911(a) (exclusive jurisdiction over reservation domiciliaries), 1911(b) (presumptive jurisdiction over non-domiciliaries), 1911(c) (right of intervention), 1912(a) (notice), 1914 (right to petition for invalidation of state-court action), 1915(c) (right to alter presumptive placement priorities applicable to state-court actions), 1915(e) (right to obtain records), 1919 (authority to conclude agreements with states)). In this regard, ICWA mandates a process, not a result.

First, "[i]n enacting the ICWA Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States." *Holyfield*, 490 U.S. at 42. This provision acknowledges the status of tribal governments as sovereign entities.

Second, relying upon the Task Force's conclusion that the "concept of [tribal] court jurisdiction is based on the tribal status of the individual rather than the mere geography of the child," Task Force Report at 86, Congress concluded that ICWA must afford tribes certain procedural rights for Indian children domiciled *off* reservation. In instances where the child is not domiciled on the tribe's reservation, Section 1911(b) creates the presumption that any proceeding concerning foster care or the termination of parental rights for an Indian child will be transferred to tribal court, "*absent objection* by either parent . . . or the Indian custodian or the Indian child's tribe." 25 U.S.C. § 1911(b) (emphasis added); *see also* H.R. Rep. No. 95-1386, at 21 ("Either parent is given the right to veto such transfer.").

ICWA thus reflects Congress's determination that the tribe has a sovereign interest in its citizens no matter where they reside. As one state court reviewing and applying these provisions has concluded, this Court's decision in "*Mississippi Choctaw* indicates that the jurisdictional provisions of ICWA apply to child custody proceedings involving Indian children regardless of where the children are born or where they are proposed for adoption." *In re Baby Boy Doe*, 849 P.2d 925, 931 (Idaho 1993). By ensuring that the tribe's sovereign jurisdiction over its own citizens is preserved and recognized by the individual States within the federal system, Congress

intended ICWA to serve "the interest the tribe has in its children." *Id.*

II. CONGRESS HAS THE EXCLUSIVE POWER TO LEGISLATE WITH RESPECT TO INDIAN TRIBES

In enacting ICWA, Congress concluded that a federal legislative response to the crisis before it was necessary for two reasons. *First*, Congress recognized that, as the legislative arm of the federal government, it alone held the requisite authority under the Constitution, as well as the historical responsibility, to correct the problem. *See* 25 U.S.C. § 1901(1)-(2). *Second*, although States' adoption policies and practices contributed significantly to the creation of the crisis, States do not have the inherent power to legislate with respect to Indian affairs, which is the responsibility of the federal government as trustee of the Indian tribes. *See* 25 U.S.C. § 1901(3), (5).

A. The Constitution Grants Congress Broad Power Over Indian Affairs

The Constitution affords Congress exclusive authority to regulate concerning Indian affairs and tribal government. *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975). This Court has described Congress's authority in this realm as "plenary," "broad," and "exclusive." *See id.*; *United States v. Lara*, 541 U.S. 193, 200 (2004). This power is not limited to reservations or Indian lands. Rather, "Congress possesses the broad power of legislating for the protection of the Indians *wherever* they may be within the territory of the United States." *United States v. McGowan*, 302 U.S. 535, 539 (1938) (emphasis added); *see also Morton v. Ruiz*, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Govern-

ment to deal fairly with Indians wherever located has been recognized by this Court on many occasions."); *Perrin v. United States*, 232 U.S. 478, 482 (1914) (explaining that congressional power extends "whether upon or off a reservation and whether within or without the limits of a state").

"The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974). It derives from the Indian Commerce Clause (Art. I, § 8, cl. 3), *e.g.*, *Dick v. United States*, 208 U.S. 340, 356-57 (1908) ("Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes, a power as broad and as free from restrictions as that to regulate commerce with foreign nations."); the Treaty Clause (Art. II, § 2, cl. 2), *e.g.*, *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973); the Property Clause (Art. IV, § 3, cl. 2), *e.g.*, *United States v. Kagama*, 118 U.S. 375, 379-380 (1886); and the Debt Clause (Art. I, § 8, cl. 1), *e.g.*, *United States v. Sioux Nation of Indians*, 448 U.S. 371, 397 (1980).

In describing Congress's constitutional authority over Indian affairs, this Court has held that "[t]he central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs." *Lara*, 541 U.S. at 200. And although "[t]he treaty power does not literally authorize Congress to act legislatively, . . . treaties made pursuant to that power can authorize Congress to deal with matters with which otherwise Congress could not deal." *Id.* at 201. Congress's authority to legislate over Indian affairs arises not only from the text of the Constitution itself, but also from this Court's recognition that, throughout "much of the

Nation's history, [it was the hundreds of] treaties, and [congressional] legislation made pursuant to those treaties, [that] governed relations between the Federal Government and the Indian tribes." *Id.* Congress's constitutionally derived authority to legislate with respect to Indian tribes is well-established.

B. The Federal Government's Authority Does Not Inhere In The States

1. The Constitution Excluded States From Wielding Power With Regard To Indian Tribes

Since the inception of the United States, interactions between the United States and Indian nations have been vested exclusively in the federal government. *Worcester v. Georgia.*, 31 U.S. 515, 557, 561 (1832) ("The treaties and laws of the United States [have always] contemplate[d] . . . that all intercourse with [Indian tribes] shall be carried on exclusively by the government of the union."). This Court has deemed the supremacy of congressional regulation necessary to protect Indian nations from States, whose actions have historically threatened tribal self-governance and continued existence. *See Kagama*, 118 U.S. at 383-84 (concluding that this exclusively federal authority "is within the competency of congress" in part because Indian tribes "owe no allegiance to the states, and receive from them no protection").

In drafting the Constitution, the Framers determined that "[t]he only efficient way of dealing with the Indian tribes was to place them under the protection of the general government." *Dick*, 208 U.S. at 356. They considered, but rejected, inclusion of a provision in the Articles of Confederation that

subjected the power of the federal government over Indian affairs to the qualification "that the legislative right of any state within its own limits be not infringed or violated." *See* Articles of Confederation of 1781, art. IX, para. 4; *see also* Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 26 (2002) ("This ambiguous proviso preserving some state authority over tribes became a source of controversy in the pre-constitutional era. The Constitution eliminated the qualification. . . .") (internal footnote omitted). The framers of the Constitution thus purposefully removed any former assignment of power over Indian tribes to the states, and instead reserved that power exclusively and unambiguously to the federal government. *See Worcester*, 31 U.S. at 559 ("The shackles imposed on this power, in the confederation, [have now been] discarded."). Consequently, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

2. Only Congress May Manage The Trust Relationship Between The Federal Government And The Tribes

In addition to deriving from the text of the Constitution, Congress's authority to regulate Indian affairs to the exclusion of the States arises from the historic trust relationship between the federal government and Indian tribes. As a result of the treaties signed with Indian tribes to acquire the majority of the lands constituting the United States today, the federal government "charged itself with moral obliga-

tions of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (citing 1856 treaty between United States and Seminole Nation). Since this Court's decision in *Seminole Nation*, these "moral obligations" grounded in treaties have evolved into "a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). This Court has reaffirmed that management of this trust relationship is assigned to Congress. *See United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011) ("Throughout the history of the Indian trust relationship, [the Court] ha[s] recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.").

As *Jicarilla Apache Nation* recognized, this trust relationship vests Congress with the constitutional authority to legislate over Indian affairs. *See id.* at 2323-24 (noting that Congress has the authority to "define[] . . . the trust relationship between the United States and the Indian tribes"); *see also Blackfeather v. United States*, 190 U.S. 368, 373 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize."). Indeed, the United States's trust relationship with Indian nations has no counterpart in any relationship between Indian nations and individual States. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979) ("States do not enjoy this same unique relationship with Indians . . . ."). The trust relationship between Indian tribes and the United States is "an instrument of federal policy[,]" and Congress therefore has the authority to "invoke[]

its trust relationship to prevent state interference with its policy toward the Indian tribes." *Jicarilla Apache Nation*, 131 S. Ct. at 2327 & n.8. When it comes to regulation of Indian affairs related to tribal government and sovereignty, only Congress has the necessary constitutional authority to complete the task.

III. ICWA FALLS WITHIN CONGRESS'S CONSTITUTIONAL POWER AND DOES NOT VIOLATE EQUAL PROTECTION PRINCIPLES

Because Congress enacted ICWA pursuant to its plenary powers derived from the Indian Commerce Clause, its duties as trustee of the Indian people, and its exclusive role in maintaining the integrity of the United States's relationship with Indian tribes within a federal system, *see* 25 U.S.C. § 1901(1), the enactment of ICWA should be understood as based on a political classification necessary to Congress's exercise of its plenary authority and duties as trustee of the Indian people. Any conclusion to the contrary would run afoul of this Court's previous holdings permitting legislation targeted specifically at American Indians based on their membership in distinct political communities.

A. ICWA Is A Constitutional Exercise Of Congress's Exclusive Authority Over Relations With Indian Tribes

Congress's exclusive power over tribal relations is at its height when Congress acts to protect the continued existence and integrity of Indian tribes as distinct political communities. ICWA fits within this broad congressional power because it regulates and protects tribal affairs designed to promote tribal self-

government through the preservation of the citizenship of its members. *See* 25 U.S.C. § 1901(1). Furthermore, in enacting ICWA, Congress explicitly relied upon both its authority pursuant to the Treaty Clause, 25 U.S.C. § 1901(2), and its plenary trust authority and concomitant obligations to Indian tribes as their "trustee," 25 U.S.C. § 1901(3). ICWA thus is a constitutional exercise of Congress's unique, federal power over Indian affairs, and does not infringe upon any States' rights reserved in the Tenth Amendment or structural principles of federalism.

As Representative Udall noted at the time of ICWA's passage, "state courts and agencies and their procedures share a large part of the responsibility" for the crisis threatening "the future and integrity of Indian tribes and Indian families." 124 Cong. Rec. 38103; *see also Holyfield*, 490 U.S. at 44 (noting that the text and legislative history of ICWA demonstrate that "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities"). Because state adoption policies and practices contributed significantly to the problem, and because only Congress has the requisite plenary authority to address the problem, ICWA was necessarily a federal solution.

ICWA does not infringe upon the States' regulation of domestic family relations because, as this Court has concluded, tribes retain *their* inherent sovereign authority over such proceedings.[13] *See Fisher*, 424

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[13] *See, e.g., In re Lelah-puc-ka-chee*, 98 F. 429 (N.D. Iowa 1899) (state court lacked jurisdiction to appoint guardian for Indian child living on reservation); *In re Adoption of Buehl*, 555 P.2d 1334 (Wash. 1976) (state court lacked jurisdiction over custody of Indian children placed in off-reservation foster care by tribal court order).

U.S. at 387-88 (concluding that "powers of self-government conferred upon [Indian tribes] and exercised through the[ir] Tribal Court[s]" include tribal jurisdiction over Indian child adoption proceedings); *see also Wakefield v. Little Light*, 347 A.2d 228, 234 (Md. 1975) ("[C]hild-rearing is an 'essential tribal relation' within the doctrine espoused by the Supreme Court in *Williams v. Lee*, [358 U.S. 217 (1959)].").

As this Court noted in *Holyfield*, "[t]ribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA." *Holyfield*, 490 U.S. at 42. A tribe's sovereign authority over its internal domestic relations existed well before 1978. *See Kagama*, 118 U.S. at 381-82 (recognizing that tribes maintain the inherent sovereign "power of regulating their internal and social relations"). Congress, through ICWA, merely sought to protect the authority tribes already held.

Likewise, ICWA's provisions concerning tribal court jurisdiction over children not domiciled on a reservation align with this Court's holding that Congress's power over Indian affairs does not stop at a reservation's borders. *Perrin*, 232 U.S. at 482. Thus, in instances where the child does not live on a tribe's reservation, ICWA creates the presumption that any proceeding concerning foster care or the termination of parental rights for an Indian child will be transferred to tribal court, unless either parent (Indian or non-Indian) objects. 25 U.S.C. § 1911(b). This carefully considered provision of ICWA protects the tribe's sovereign interest in the placement of its future citizens while simultaneously preserving the right of any parent to have such proceeding heard in state court.

Furthermore, the procedural standards that state courts must follow when adjudicating the placement of an Indian child fall within the scope of Congress's constitutional authority to legislate over Indian affairs "although within the limits of a State." *United States v. Holliday*, 70 U.S. 407, 418 (1865). This Court has long recognized that Congress's "right to exercise it[s authority] in reference to any Indian tribe" is not limited to "the limits of a State[,]" but instead extends "to any Indian tribe, or any person who is a member of such tribe." *Id.* In this regard, ICWA constitutes a constitutional exercise of Congress's power pursuant to the Indian Commerce Clause.

ICWA also constitutes a constitutional exercise of Congress's authority under the Treaty Clause. ICWA specifically cites this power, 25 U.S.C. § 1901(2), and the invocation of authority under the Treaty Clause accords with this Court's approved use of such authority. *E.g., Rice v. Cayetano*, 528 U.S. 495, 519 (2000); *see also Kagama*, 118 U.S. at 384 (Congress derives its power to regulate Indian affairs from the "course of dealing of the federal government with [Indian nations], and the treaties in which [the federal government] promised . . . the duty of protection").

Congress's enactment of ICWA likewise falls within its historical duties as trustee. *Jicarilla Apache Nation*, 131 S. Ct. at 2327 & n.8. ICWA specifically invoked Congress's "authority as trustee." 25 U.S.C. § 1901(3). Indeed, ICWA's legislative record reflects Congress's "considered judgment" that "[t]he U.S. Government, pursuant to its trust responsibility to Indian tribes, has failed to protect the most valuable resource of any tribe—its children." Task Force

Report at 87.[14] Ultimately, Congress determined that the tribes' continued existence as self-governing communities depends upon their children as citizens and future governmental leaders, and thus ICWA reflects Congress's "considered judgment" to "design[] the trust relationship to serve the interests of the United States as well as to benefit the Indian tribes." *Jicarilla Apache Nation*, 131 S. Ct. at 2327 & n.8.

B. ICWA's Classification Of "Indian Child" Is A Political Classification

ICWA defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). This definition constitutes a political classification because it singles out Indians based solely on membership in a sovereign Indian tribe. The narrow definition relates only to the unique tribal requirements for membership, not race, and thus guarantees ICWA's application to only those Indian children with the potential to carry on the traditions, culture, and self-government of the tribes. As a result, this classification does not violate the equal protection principles embodied in the Fifth Amendment's Due Process Clause.[15]

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[14] As Representative Udall explained: "[B]ecause of the trust responsibility owed to the Indian tribes by the United States to protect their resources and future, we have an obligation to act to remedy this serious problem. What resource is more critical to an Indian tribe than its children?" 124 Cong. Rec. 38102.

[15] Because "the Fourteenth Amendment [] applies only to the states," *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954), any equal protection challenge to ICWA's classification of "Indian

As an initial matter, ICWA's classification based on tribal membership does not equate with race. Indeed, ICWA's definition of "Indian child" leaves out many individuals who are racially "Indian" but not eligible for membership in a federally recognized tribe, and includes individuals who are *not* "Indian" by race or ancestry, but have been granted citizenship in a tribe. *See Mancari*, 417 U.S. at 553 n.24 (recognizing that, where Congress uses "Indian" to signify "members of 'federally recognized' tribes[, t]his operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature."). Like the statute in *United States v. Antelope*, 430 U.S. 641 (1977), ICWA classifies "Indian child[ren]" not "because they are of the Indian race but[, rather,] because they are [voluntarily] enrolled members of" a federally recognized tribe. 430 U.S. at 646. As a result, such legislation "is not based upon impermissible racial classifications" because it is "rooted in the unique status of Indians as 'a separate people' with their own political institutions." *Antelope*, 430 U.S. at 646. [16]

ICWA's classification based on membership is thus political, and not racial, because citizens of Indian nations must decide voluntarily to affiliate them-

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child" arises from the equal protection principles embodied in the Fifth Amendment's Due Process Clause, *see id.*

[16] Congress knowingly *excluded* individuals who are racially Indian but not enrolled in a tribe, in line with this Court's constitutional teachings in *Mancari* and *Antelope*. *See* 1978 Hearings at 151 (criticism of ICWA's definition of "Indian child" excluding individuals with Native ancestry not enrolled in a federally recognized tribe); *see also* S. Rep. No. 104-288, at 4 (Congress refused to extend ICWA to "persons of Indian descent.").

selves as tribal citizens—tribal citizens can always terminate their citizenship of their own free will. *See Means v. Navajo Nation*, 432 F.3d 924, 935 (9th Cir. 2005) ("[Petitioner] has chosen to affiliate himself politically as an Indian by maintaining enrollment in a tribe. His Indian status is therefore political, not merely racial.").[17]

Furthermore, ICWA's definition of "Indian child" refrains from defining any requirements for citizenship in a federally recognized tribe. That is a power of the sovereign Indian nations, not Congress. *See Santa Clara Pueblo*, 436 U.S. at 72 n.32 ("A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."); *see also Rice*, 528 U.S. at 527 ("[A] Native American tribe has broad authority to define its membership."); *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (same).

There is no precedent to support the conclusion that ICWA's definition of "Indian child" invokes a racial classification. In fact, this Court's precedents support the opposite conclusion. *See, e.g., Lara*, 541 U.S. at 209 (rejecting the argument that "Congress's use of the words 'all Indians'" violates equal protection principles); *Fisher*, 424 U.S. at 390-391 (1976) (concluding "Indian" classification relates not to race but "the quasi-sovereign status of the [tribe]"); *Antelope*, 430 U.S. at 646 (similar); *Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S.

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[17] *See also Smith v. Bonifer*, 154 F. 883, 886 (C.C.D. Or. 1907) ("[M]embers of [a] tribe can sever their relations as such . . . .").

at 501 (similar).[18] Time and again this Court has affirmed its prior holdings that legislation targeted at Indians cannot be analyzed within the traditional equal protection framework because such preferences are "not racial at all [when they are] . . . 'reasonably designed to further the cause of Indian self-government.'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 304 n.42 (1978) (quoting *Mancari*, 417 U.S. at 554). ICWA falls precisely within this constitutionally permissible category.

C. Congressional Classifications Of "Indian" Are Necessary To Effectuate Congress's Constitutional Authority Over Indian Affairs

To effectuate Congress's exclusive power over Indian affairs, Congress must retain the ability to pass legislation targeted at Indian tribes and their citizens. Absent this ability, Congress could not carry out its constitutional authority over Indian affairs or its duties as trustee of Indian peoples.

This Court repeatedly has held that "legislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution." *Antelope*, 430 U.S. at 647 n.8. As this Court has recognized, if classifications

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[18] Although the Ninth Circuit struck down a challenged preference in the Reindeer Act, 25 U.S.C. §500n, that Act presented a classification that differed significantly "from a lot of other legislation pertaining to Native Americans," including ICWA. *Williams v. Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997). The Reindeer Act's classification did not hinge on membership in a federally recognized tribe but, rather, on the term "Native." *See id.* at 663-64. Consequently, *Williams* offers no guidance to this Court's analysis of ICWA, a statute that classifies based on membership in a tribe, not the term "Native."

based on membership in a federally recognized tribe "were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Mancari*, 417 U.S. at 552.

This result was explicitly rejected by Congress at the time the Fourteenth Amendment was passed. S. Rep. No. 41-268, at 1 (1870). The Fourteenth Amendment was to apply to "every human being, no matter what his complexion," Cong. Globe, 37th Cong., 2d Sess. 1640 (1862), *except* for Indian tribes and their members because the tribes were "recognized at the organization of this Government as independent sovereignties," *id.* at 1639. *See also* S. Rep. No. 41-268, at 1 (The Fourteenth Amendment did "not annul the treaties previously made between [Indian nations] and the United States."). This Court previously has concluded that the Fourteenth Amendment never granted Indians any rights or privileges because, at the time of the Amendment's passage, they were citizens of "distinct political communities." *Elk v. Wilkins*, 112 U.S. 94, 99-100 (1884). Indeed, Indians did not become citizens of the United States until 1924. *See* 1924 Indian Citizenship Act, ch.233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)). If congressional classifications of "Indian" are deemed unconstitutional, then the very congressional act that made Indians citizens of the United States would be rendered unconstitutional.

Thus ICWA, no less than other congressional legislation classifying Indians based on their citizenship in a tribe, is a political classification arising from the sovereign-to-sovereign governmental relationship formed between the United States and

Indian nations as a result of the treaties they negotiated and signed. As *Mancari* concluded, such congressional political classifications run concomitant with the United States's treaty duties and obligations to Indian tribes as trustee. *Mancari*, 417 U.S. at 541-42; *see also Rice*, 528 U.S. at 519 ("Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs."). To deem congressional classifications of "Indian" invidious discrimination would render Congress unable to carry out its constitutional authority over Indian affairs.

CONCLUSION

For the foregoing reasons, and for those stated by the Respondents, the decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF FAMILY LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS BIRTH FATHER AND CHEROKEE NATION

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Professors Annette R. Appell, Tonya L. Brito, Nancy E. Dowd, Matthew I. Fraidin, Josh Gupta-Kagan, C. Quince Hopkins, Shani M. King, Dorothy E. Roberts, Elizabeth J. Samuels, Natsu Taylor Saito, Lawrence Schlam, Tanya Washington, and Jessica Dixon Weaver submit this brief as *amici curiae* in support of Respondents Birth Father and the Cherokee Nation.[1]

INTEREST OF THE *AMICI CURIAE*

Amici are law professors who teach family law or closely related subjects and publish scholarship on children's rights, parents' rights, adoption, child custody, and child welfare systems. Annette R. Appell is Professor of Law and Co-Director of the Civil Justice Clinic at Washington University School of Law. Tonya L. Brito is Professor of Law at the University of Wisconsin Law School, and a Faculty Affiliate with the Institute for Research on Poverty at the University of Wisconsin. Nancy E. Dowd is Professor and David H. Levin Chair in Family Law at the University of Florida Levin College of Law, and also serves as the Director of the Center on Children and Families. Matthew I. Fraidin is Associate Professor of

[1] In accord with Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Each of the parties has filed with the Clerk notice of its consent to the filing of *amicus* briefs in support of either party or of neither party.

Law at the University of the District of Columbia David A. Clarke School of Law. Josh Gupta-Kagan is a Lecturer in Law at the Washington University School of Law, and Staff Attorney in the law school's Children and Family Defense Clinic. C. Quince Hopkins is Professor of Law at Florida Coastal School of Law. Shani M. King is Associate Professor of Law and Co-Director of the Center on Children and Families at the University of Florida Levin College of Law. Dorothy E. Roberts is George A. Weiss University Professor of Law and Sociology, and Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights at the University of Pennsylvania Law School. Elizabeth J. Samuels is Professor of Law at the University of Baltimore School of Law. Natsu Taylor Saito is Professor of Law at Georgia State University College of Law. Lawrence Schlam is Professor of Constitutional and Child Law at Northern Illinois University College of Law. Tanya Washington is Associate Professor of Law at Georgia State University College of Law. Jessica Dixon Weaver is Assistant Professor of Law at SMU Dedman School of Law.

Several of the *amici* study Indian families and the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901 *et seq*. Most study at the intersection of race, gender, and child custody. Through their research and teaching, *amici* work to promote children's right to their family relationships through legal structures that recognize the heterogeneous nature of American families. For these reasons, *amici* have an interest in the proper interpretation and application of ICWA to

protect the rights of Indian children and families, as Congress intended.

SUMMARY OF ARGUMENT

The South Carolina Supreme Court correctly decided this case. As it recognized, the application of ICWA in this case served to protect Baby Girl's best interests through statutory provisions recognizing Birth Father as her legal parent and protecting that relationship, and it did so consistent with the Constitution.

Congress passed ICWA in response to overwhelming evidence that states were improperly removing Indian children from their families. In order to arrest this disturbing trend, ICWA establishes heightened protections for an Indian child's parent or Indian custodian, including minimum federal standards governing the termination of any parent-child relationship. Because ICWA preempts state law, if an Indian child's biological father has acknowledged or established paternity, then he is entitled to ICWA's protections in child custody proceedings. The court below correctly determined that Birth Father met the statutory definition of "parent" and correctly applied ICWA to deny the adoption and return Baby Girl to his custody.

The statutory text and legislative history demonstrate that Congress intended ICWA to afford unwed Indian parents in Birth Father's position greater

protections than the minimum parental rights required by the Constitution. This Court's prior decisions concerning unwed fathers provide protection for fathers who otherwise would be precluded from child custody proceedings under state law; they do not establish requirements fathers must meet to be recognized as a "parent." The reference to one of those decisions in ICWA's legislative history indicates Congress's recognition that the Constitution affords certain minimum rights independent of ICWA's statutory definition of "parent"; it does not suggest that Congress meant to limit that definition to the constitutional minimum. Further, nothing in the Constitution or this Court's jurisprudence limits Congress's power to establish the heightened protections ICWA affords, above and beyond the constitutional minimum.

When drafting ICWA, Congress understood that Indian children, like other children, are best served by living under the care of a fit parent. This interest is heightened by Congress's goal of preserving the cultural traditions of Indian children. These notions permeate ICWA, to the extent that a separate best-interests finding is unnecessary in proceedings under the statute. The South Carolina Supreme Court's additional finding in this case that ICWA's provisions as applied were consistent with Baby Girl's best interests, though unnecessary under ICWA, only confirmed that the statutory provisions appropriately protect the rights of Indian children.

Further, the South Carolina Supreme Court's application of ICWA was fully consistent with this

Court's constitutional protection of fundamental liberty interests. Petitioners' claim that the birth mother's fundamental liberty interest was violated fails not only because they lack standing to raise the issue, but more fundamentally because the birth mother lacked any rights at all in the proceedings below; she voluntarily relinquished them. Petitioners similarly lack any relevant liberty interest. Finally, while this Court has never delineated the constitutional liberty interests of children, it has made clear that a child's best interests are served when family integrity is preserved.

In sum, the South Carolina Supreme Court applied ICWA in a manner that protected Baby Girl's right to live with her fit biological father, consistent with the intent of Congress, the child's best interests, and the Constitution.

ARGUMENT

I. THE DECISION BELOW CORRECTLY APPLIED ICWA TO PROTECT THE INTERESTS OF BIRTH FATHER AND BABY GIRL.

The express purpose of ICWA is to further "the policy of this Nation to protect the best interests of children . . . by the establishment of minimum Federal standards for the removal of Indian children from their families. . . ." 25 U.S.C. § 1902. Congress passed ICWA in response to findings that the percentage of Indian children who were being placed

in non-Indian adoptive homes and institutions after being removed from their families was "alarmingly high," and that such removals were "often unwarranted." *Id.* § 1901(4). Thus, a fundamental purpose of ICWA is to protect the rights of Indian children to remain with their families.

ICWA seeks to protect the rights of children by establishing procedural standards focused on parents. For example, it requires a determination of damage to the child based on clear and convincing evidence prior to ordering removal from the parent or Indian custodian, *id.* § 1912(e), and a determination of damage to the child based on evidence beyond a reasonable doubt prior to terminating the parental rights of a parent or Indian custodian, *id.* § 1912(f). ICWA defines "parent[s]" to include "any biological parent or parents of an Indian child," and only excludes from that definition unwed fathers "where paternity has not been acknowledged or established." *Id.* § 1903(9).

Congress also found in enacting ICWA that states "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* § 1901(5); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989) ("[T]he congressional findings that are part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct."). Consequently, where the *minimum* federal standards provide greater protection to the parent or Indian custodian of an Indian

child than state law provides, ICWA preempts state law. *See* 25 U.S.C. § 1921.

A. Congress Intended ICWA's Heightened Protections to Apply to Fathers in the Position of Birth Father.

Because ICWA establishes minimum protections for parents of Indian children notwithstanding any contrary state law, a parent need only meet the statutory definition of "parent" under ICWA in order to be afforded its protections. Thus, an unwed father of an Indian child who has acknowledged or established his paternity – as Birth Father has done here – is a "parent" under ICWA. *Id.* § 1903(9). As such, he is entitled to the heightened protections of ICWA, including the requirement of a showing of harm to his child beyond a reasonable doubt prior to termination of his parental rights, and stringent requirements for obtaining a parent's voluntary consent to an adoption. *Id.* §§ 1912(f); 1913(a). Any state law provisions to the contrary that do not provide higher protections to the parent are preempted by ICWA. *Id.*[2]

Nothing in ICWA's legislative history or this Court's jurisprudence suggests either that Congress

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[2] *Amici* adopt the reasoning of the lower courts, Birth Father, Cherokee Nation, and the United States that the state's consent-to-adoption statute, S.C. Code § 63-9-310, is irrelevant in light of Birth Father's actions to legally acknowledge and establish, via DNA evidence, his paternity.

intended to exclude a parent like Birth Father from the protections of ICWA, or that Congress lacks power to grant such a parent rights greater than those required by the Constitution. This Court's decisions recognizing certain minimum constitutional rights of unwed fathers do not prevent Congress from legislating additional rights above the constitutional floor. Congress and state legislatures remain free to establish greater protections for parent-child relationships than the minimum afforded by the Constitution.

In a series of cases beginning in 1972, this Court considered equal protection and due process challenges to state laws denying unwed fathers the protections guaranteed to unwed mothers and wed fathers. *See Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammad*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983). These decisions establish that unwed fathers who grasp the opportunity to parent their biological children have *constitutionally* protected interests equal to married parents and unwed mothers.[3] *See Stanley*, 405 U.S. at 658; *Caban*, 441 U.S. at 392. On the other hand, unwed fathers who have only a biological link to their children, and

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[3] "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." *Lehr*, 463 U.S. at 262.

nothing more, are *not constitutionally* entitled to the procedural protections given to married fathers and mothers. *Quilloin*, 434 U.S. at 256 (rejecting challenge to state statutory scheme denying an unwed father notice of his child's adoption); *Lehr*, 463 U.S. at 268 (rejecting a challenge to a state statutory scheme denying an unwed father the right to veto an adoption finalized without his consent).

The legislative history of ICWA indicates that Congress was aware of the Court's unwed father cases. The House Report on the bill includes the following passage:

> Paragraph (9) defines "parent". It should be noted that the last sentence is not meant to conflict with the decision of the Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972).

H.R. Rep. No. 95-1386, at 21 (1978). The reference to *Stanley* indicates simply that the House recognized the *constitutional* rights of all unwed fathers as established by that decision; it does not suggest any intent to make the class of parents entitled to ICWA's protections coextensive with the class of fathers constitutionally entitled procedural rights under this Court's decisions. Indeed, the legislative history indicates no intent to impose requirements on a parent beyond the express statutory definition.[4]

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[4] It is telling that no citation to *Quilloin* appears in the legislative history. *Quilloin* was the first unwed father case after

(Continued on following page)

The statutory language and the legislative history demonstrate Congress's intent to include a wide class of unwed fathers within ICWA's definition of "parent." Birth Father met the necessary requirements. He is Baby Girl's "parent" within the meaning of ICWA, and he and Baby Girl are entitled to the statute's protections.

B. Application of ICWA to Birth Father is Consistent with the Constitution and the Unwed Father Cases.

Contrary to the contentions of Petitioners and their *amici*, nothing in the Constitution prevents Congress, through ICWA, from affording unwed fathers like Birth Father greater protections than the minimal protections the Constitution requires.

The unwed father cases delineate constitutional rights only, and, in *Quilloin* and *Lehr*, approved state laws that affected fathers who were *not* protected by the Constitution. *See Quilloin*, 434 U.S. at 256 (upholding Georgia statute that denied an unwed father who had not "legitimated" his child a right to consent to or veto an adoption); *Lehr*, 463 U.S. at 266-68 (upholding a New York law that denied notice of an adoption to unwed father who had never

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Stanley, and the first to delineate limits on an unwed father's rights. *Quilloin*, 434 U.S. at 248. If the House had intended ICWA's definition of "parent" to limit the rights of unwed fathers, it would logically cite *Quilloin*, which did exactly that.

established a substantial relationship with his daughter). *Quilloin* and *Lehr* approved state statutory schemes that sought to balance the rights of family integrity with the state interest in facilitating speedy adoptions when necessary and appropriate. *See Lehr*, 463 U.S. at 263. These cases, therefore, gave legislators the freedom to legislate in accordance with the interest of their states; they did not prohibit legislatures from making different policy choices where the Constitution did not command otherwise.

ICWA is similarly an exercise of Congress's power to legislate consistently with constitutional rights. Its broad definition of "parent" seeks to effectuate a policy choice to strengthen and support the rights of unwed fathers in order to promote family integrity and increase the number of Indian families protected under the provisions of the statute.

While Congress clearly cannot fail to provide an unwed father who meets the "biology plus" standard established by this Court's jurisprudence with less than his constitutional guarantee, it does not follow that Congress is prohibited from statutorily providing greater protections to fathers of Indian children. *See, e.g., United States v. Rizzi*, 434 F.3d 669, 675 (4th Cir. 2006) ("The existence of a minimum constitutional protection . . . does not deny legislatures the power to provide additional, more nuanced protections, based on the wishes and habits of their constituents."). Indeed, the Court has recognized that "wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the

Constitution." *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 33 (1981). The unwed father decisions impose a *floor*, not a *ceiling*, on the rights of unwed fathers, and Congress is free to legislate above that floor.[5] This is precisely what ICWA does: in order to protect Indian children and families, it provides protections for unwed fathers (who have established and acknowledged paternity) that are not necessarily guaranteed by the Fifth or Fourteenth Amendments alone.[6]

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[5] ICWA is just one of many instances in which Congress has legislated rights greater than the minimum rights established by the Constitution. For example, the Religious Land Use and Institutionalized Person Act of 2000 exceeds the constitutional requirements of the First Amendment, as articulated in *Employment Division v. Smith*, 494 U.S. 872 (1990). *See Mayweathers v. Newland*, 314 F.3d 1062, 1070 (9th Cir. 2002) ("RLUIPA provides additional protection for religious worship, respecting that *Smith* set only a constitutional floor – not a ceiling – for the protection of personal liberty."). As another example, in *Bd. of Educ. of City Sch. Dist. of City of New York v. Harris*, 444 U.S. 130 (1979), the Court interpreted the Emergency School Aid Act as excluding from funding eligibility educational agencies whose policies or practices had discriminatory impact, even though the Court's Equal Protection Clause jurisprudence prohibits purposeful discrimination. *See id.* at 149 ("[W]e readily conclude that the discrimination that disqualifies for funding under ESAA is not discrimination in the Fourteenth Amendment sense.").

[6] The definition of "parent" is not the only ICWA provision that establishes rights above the constitutional floor. For example, the Court has required states to prove parental unfitness by clear and convincing evidence before terminating parental rights. *See Santosky v. Kramer*, 455 U.S. 745, 748 (1982). ICWA, however, requires states to prove "beyond a reasonable doubt . . .

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II. IT IS IN BABY GIRL'S BEST INTERESTS TO LIVE WITH HER FATHER.

Congress considered the competing interests at stake in contested custody proceedings such as this, and determined that applying ICWA's protections serves Indian children's best interests. 25 U.S.C. § 1902. Thus, contrary to the contentions of the Guardian Ad Litem, the South Carolina Supreme Court's application of ICWA's heightened protections in this case was consistent with Baby Girl's best interests.

A child's best interests are part of any custody determination. The framework for that determination, however, is neither universal nor extralegal. Instead, to address the inherent subjectivity of individuals, legislatures mandate how best-interests determinations are to be made. For example, in many states, following a determination of neglect or termination of parental rights, a judge must base his or her custody decision on a list of enumerated factors that amount to the state legislature's determination of what is generally in the child's best interests.[7] By

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[that] custody of the child by the parent . . . is likely to result in serious emotional or physical damage." 25 U.S.C. § 1912(f). Additionally, this Court has found that the right to counsel is not constitutionally required for all termination of parental rights proceedings. *See Lassiter*, 452 U.S. at 33. ICWA, however, requires counsel for parents "in any removal, placement, or termination proceeding." 25 U.S.C. § 1912(b).

[7] Common factors include a child's emotional attachments with family and household members; the parents' capacity to provide a safe home with adequate food, clothing, and medical

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contrast, under ICWA, the best-interests concept is woven into every provision protecting an Indian child's right to remain with her family or tribe.

By creating minimum federal standards to prevent the breakup of the Indian child's family, Congress recognized what this Court has long held: that it is in a child's best interests to be raised by a fit parent. *See Troxel v. Granville*, 530 U.S. 57, 68 (2000); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Santosky*, 455 U.S. at 760-61 ("[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."). Children deserve to grow up with their biological parents when it is possible and safe for them to do so. *Cf. Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."). The problem, as Congress realized, was that states were not acting in the best interests of Indian children by *unnecessarily* removing them from fit parents at alarming rates. *See* 25 U.S.C. § 1901(4).[8]

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care; the child's mental and physical health needs; the parents' mental and physical health; and the presence of domestic violence. *See* Child Welfare Information Gateway, U.S. Dep't of Health and Human Services, *Determining the Best Interests of the Child: Summary of State Laws* (2010), *at* www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm.

[8] This is not an unusual finding. Even today, socioeconomic factors, the availability of culturally appropriate services, and other differences in treatment lead to a disproportionate number

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ICWA's heightened protections are thus designed to ensure that Indian children are raised by a fit biological parent whenever possible. *See, e.g., Id.* (requiring active efforts to "prevent the breakup of the Indian family" prior to foster care placement or termination of parental rights); 1913(a) (requiring a judge to certify that all voluntary consents were fully understood by the parent); 1913(c) (allowing a parent to withdraw voluntary consent any time prior to the entry of a final adoption decree). As indicated above, ICWA requires the judge to make a finding, supported by the testimony of a qualified expert witness, that continued custody with the parent would result in harm to the child beyond a reasonable doubt. *Id.* § 1912(f). These protections are consistent with this Court's recognition that a child's best interests are served by being raised by her fit parent.[9]

Further, both the South Carolina Supreme Court and the family court before it agreed that it was in

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of minority children in foster care. *See* Child Welfare Information Gateway, U.S. Dep't of Health and Human Services, *Addressing Racial Disproportionality in Child Welfare*, Issue Brief, 2-5 (2011), *at* https://www.childwelfare.gov/pubs/issue_briefs/racial_disproportionality/.

[9] ICWA also carries specific provisions about when moving a child from her current placement becomes too harmful, and thus against her best interests. *Compare* 25 U.S.C. § 1913(d) (two year time limit to invalidate adoption based on fraud or duress) *with* § 1920 (no time limit on action to return child from illegal custody).

Baby Girl's best interests to live with and be raised by her fit biological father.[10] These independent determinations serve to confirm that, by following the dictates of ICWA, the courts rendered a decision that was, both in the judgment of those courts and of Congress, in Baby Girl's best interests.

III. THE DECISION BELOW DID NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF ANY PARTY.

Parents' fundamental liberty interest in the care, custody, and control of their children is "perhaps the oldest fundamental liberty interest recognized by this Court." *Troxel*, 530 U.S. at 65 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *see also Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). This liberty interest includes the right of parents to establish a home and to direct their children's education and upbringing. *Meyer*, 262 U.S. at 400; *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925).

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[10] Petitioners and their *amici* make much of the fact that Baby Girl was almost two years old by the time she was returned to her father's custody. But as the South Carolina Supreme Court correctly noted, it would not be fair to the father to consider the bonding that occurred during the litigation. In fact, had Adoptive Couple served Birth Father when their adoption petition was initially filed, almost no bonding would have taken place by the time Birth Father asserted his rights.

This right, however, has never included the right of a birth mother who has relinquished her own custodial rights to select an adoption placement for her child over a fit father's objection; the right of temporary custodians to maintain custody over a child who has a fit biological parent willing to assume custody; or the right of a child to stay with temporary custodians over the objection of a fit biological parent.

A. The Birth Mother Has No Liberty Interest at Stake.

Baby's Girl's birth mother is not a party to this case because she voluntarily consented to the adoption of her child and therefore has no continuing legal relationship with her.[11] As a non-party who has surrendered her parental rights, the birth mother has no legal interest in the dispute between the adoptive parents and Birth Father, much less a fundamental liberty interest. While parents have a fundamental liberty interest in the care, custody, and control of their children, they do not have a protected interest in what happens to their child once their parental rights are terminated. Furthermore, they do not have an absolute right to select adoptive parents for their children. *See* Stan Watts, *Voluntary Adoptions Under*

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[11] Under ICWA, a parent may withdraw her consent to a voluntary termination of parental rights or adoption at any time prior to the final termination order or adoption decree, respectively. 25 U.S.C. § 1913(c). Birth Mother has not indicated any interest in resuming custody of her child.

the Indian Child Welfare Act of 1978, Balancing the Interests of Children, Families, and Tribes, 63 S. Cal. L. Rev. 213, 247 (1989) (citing A. Sussman & M. Guggenheim, The Rights of Parents 179-80 (1980)). Birth Father's choice to assert his rights once he discovered that the birth mother was relinquishing Baby Girl for adoption did not deprive the mother of her right to care, custody, and control of her child, because she had already surrendered any such right.

Further, as many state courts have recognized, a mother cannot unilaterally foreclose a father's opportunity to parent by, for example, preventing the father from establishing a relationship with an infant or supporting her during pregnancy, then claiming that the father fails to qualify for parental rights such as the opportunity to veto an adoption of his child. *See, e.g., In re Kelsey S.*, 823 P.2d 1216, 1236 (Cal. 1992); *In re B.G.C.*, 496 N.W.2d 239, 246 (Iowa 1992); *In re Kirchner*, 649 N.E.2d 324, 333 (Ill. 1995), *abrogated on other grounds by In re R.L.S.*, 844 N.E.2d 22 (Ill. 2006).[12] It is thus well established that, as

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[12] The courts in these cases recognized rights of fathers who, because of the conduct of the mother, did not meet all the statutory requirements to contest adoption of their children. For example, in *In re Kirchner*, the father discovered 57 days after his child's birth that the child was not in fact dead, as the mother told him, but had been put up for adoption. 649 N.E.2d at 327. The court allowed the father to withhold consent to the adoption notwithstanding that the applicable statute focused on a father's connection to the child within the first 30 days after birth. *See id.* at 328.

against the father's interest in parenting, a single custodial mother has no overriding right to decide the fate of their infant child.

Even if this case implicated a cognizable liberty interest belonging to the birth mother – and it does not – the birth mother is not a party here. She accordingly can assert no such interest. Nor can Petitioners assert it on her behalf, for it is well established that litigants generally are barred "from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, 422 U.S. 490, 509 (1975). Ultimately, the birth mother's putative liberty interests have no bearing on this case.

B. Petitioners Have No Liberty Interest At Stake.

Petitioners have not raised a substantive due process claim on their own behalf. Nor could they, for this Court has never identified such a right in temporary custodians. In *Smith v. Organization of Foster Families for Equality and Reform* ("*OFFER*"), 431 U.S. 816 (1977), the Court considered a procedural due process challenge brought by an organization of foster parents alleging that the state process for removing children from their care violated their constitutional rights. The Court held that any interest of foster parents is necessarily subordinate to that of the biological parent whose rights have not been terminated. *Id.* at 847 ("Whatever liberty interest might

otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."). Adoptions, like foster care, are creatures of statute. *See, e.g., Davis v. McGraw*, 92 N.E. 332, 332 (Mass. 1910); *Matter of Eaton*, 305 N.Y. 162, 165 (1953); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. Fam. L. 443, 443 (1971).

In this case, Petitioners had care of Baby Girl under an order for temporary legal and physical custody, much like the foster parents in *Smith*.[13] R. at 43. *See Smith*, 431 U.S. at 827. Like the foster parents in *Smith*, Petitioners have no fundamental liberty interest at stake here, and any interest they do have is subordinate to Birth Father's.

To change the rule for pre-adoptive parents such as Petitioners would change the law of adoption with far-reaching ramifications for parents wishing to withdraw their consent, parents coerced into consent, or parents working toward reunification in the child welfare system. The Court has never recognized a fundamental right on the part of parties in Adoptive Couple's position, and it should not do so now.

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[13] In this case Adoptive Couple did not even obtain a court order for temporary custody until May 2010 – five months after Birth Father filed a stay in the South Carolina custody proceeding. R. at 43; *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 555 (S.C. 2012).

C. The Decision Below Did Not Violate Baby Girl's Liberty Interests.

Baby Girl is another constitutional stakeholder whose interests must be separately taken into account. Children may have a fundamental liberty interest in determinations about their custody. *See Smith*, 431 U.S. at 840-41. The contours of that interest are ill-defined, however. The potential liberty interest of Baby Girl, as articulated by Petitioners and their *amici*, offers no reason for reversal.

While one *amicus* argues that children have a constitutional right in "developed family relationships," and to "a custody decision guided by her best interests," Brief of Child Advocacy Organizations as *Amici Curiae* in Support of Baby Girl Supporting Reversal 5, 18, another discusses "a child's constitutional right to a stable, safe, and permanent home," Brief for the American Academy of Adoption Attorneys as *Amicus Curiae* in Support of Petitioners 4. Similarly, the Guardian Ad Litem refers to "certain intimate human relationships," Brief for Guardian Ad Litem, As Representative of Respondent Baby Girl, Supporting Reversal 56, and Petitioners claim that Baby Girl had a right to preserve her "familial or family-like bonds." Brief for Petitioners 49.

These arguments ignore, however, that the child's primary interest is in a relationship with her fit biological father. Indeed, the South Carolina Supreme Court awarded Birth Father custody on the

ground that he could in fact provide a safe home and developed family relationships. *Baby Girl*, 731 S.E.2d at 566 ("Appellants have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by Father and his family."). Moreover, these arguments ignore that ICWA, by providing that the statutory preferences for adoption placements may be avoided for "good cause," 25 U.S.C. § 1915(a), already accounts for what liberty interests the child may have.[14]

In any event, it cannot be said that Baby Girl, who had only been placed with the prospective adoptive couple for four months before Birth Father came forward to parent, had such a relationship or attachment. *Cf.* Lawrence Schlam, *Third-Party Standing and Child Custody Disputes in Washington: Non-Parent Rights – Past, Present, and . . . Future?*, 43 Gonzaga L. Rev. 391, 414 (2008) (discussing "meaningful nonparent-child bonding" over four-*year* period). This Court's precedent indicates that even where attachments with non-parent custodians may exist, any interest in them is subordinate to the child's interest in a continued relationship with her fit parent. *See Smith*, 430 U.S. at 846-47.

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[14] *Amici* agree fully with Birth Father and the Cherokee Nation that there was no violation of Baby Girl's liberty interests in this case. *Amici* note, however, that custody cases may arise in which children's constitutional rights are significant, and even dispositive.

Whatever the constitutional import of children's interests, any failure to respect the child's emotional attachments in this case resulted primarily from the slow pace of litigation. Recognizing a constitutional right in the fallout of that failure would be an ill-advised foray into the "treacherous field" of substantive due process. *Troxel*, 530 U.S. at 76 (Souter, J., concurring) (quotation marks and citation omitted). A constitutional right in a relationship created by the slow pace of litigation following a temporary custody award would simply incentivize delay tactics and could create conflict between a child's "best interests" and her constitutional interests.[15]

Ultimately, while *amici* agree that children may have constitutional interests in their custody determinations, there is no basis to conclude that any such interest was violated here.

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[15] *Cf. Chafin v. Chafin*, 568 U.S. ___, 133 S. Ct. 1017, 1027-28 (2013) ("[C]ourts can and should take steps to decide [cases under the International Child Abduction Remedies Act] as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation.").

CONCLUSION

For the reasons set forth above, *amici* respectfully urge the Court to affirm the judgment of the South Carolina Supreme Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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In the Supreme Court of the United States

ADOPTIVE COUPLE, PETITIONERS,
v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, *et al.*,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF OF RELIGIOUS ORGANIZATION *AMICI CURIAE* FRIENDS COMMITTEE ON NATIONAL LEGISLATION, *ET AL.*, IN SUPPORT OF RESPONDENTS

(Additional Amici Listed on Inside Cover)

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INTEREST OF AMICI CURIAE[1]

This brief is filed on behalf of the Friends Committee on National Legislation, the National Advocacy Center of the Sisters of the Good Shepherd, the Conference of Major Superiors of Men, the American Friends Service Committee, the Disciples Justice Action Network (Christian Church, Disciples of Christ), and the General Synod of the United Church of Christ, ("*Amici*"), each a domestic religious organization with past and present active involvement in the field of American Indian and Alaska Native ("Native American" or "Indian") affairs, law and policy.

Amici have a profound interest in how this case is resolved because the Court's decision will affect the legislative and policy options available to *Amici* to address the needs and concerns of Native American children they serve and support.

Amicus Friends Committee on National Legislation ("FCNL") is a Quaker lobby in the public interest - the oldest registered faith-based lobbying

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[1] Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. On February 11 and 19, 2013, all parties filed letters with the Clerk reflecting their blanket consent to the filing of amicus briefs, pursuant to Rule 37.3.

organization in Washington, DC. Founded in 1943 by members of the Religious Society of Friends (Quakers), FCNL staff and volunteers work with a nationwide network of participants and supporters to advocate for social and economic justice, peace, and good government. FCNL is a nonpartisan 501(c)(4) public interest lobby organization. For the past 35 years, through its program on Native American affairs, FCNL has advocated for policies and appropriations that support Native American cultural rights and self-determination, promote the health and well-being of Native peoples, and honor the promises made to Native Americans in treaties and other laws throughout U.S. history. FCNL seeks to inform and engage representatives of other national faith organizations in this advocacy, and to benefit from the knowledge and experience that other faith groups have gained through their work in and among Native American communities.

Amicus National Advocacy Center of the Sisters of the Good Shepherd ("Order") offers education through processes and strategies that address social justice issues and advocates for the transformation of society to the benefit of all people. Since the Order was founded in France in 1835, it has dedicated itself to serving poor and marginal people. The work of the Order in 70 countries in five continents, 22 states, and two U.S. territories is based on the belief that everyone, regardless of age, sex, culture or religion, has the right to a basic quality of life; adequate income, shelter, opportunities for education and employment, quality

health care, and nutrition. As Catholics, our faith requires that everyone should be treated with the utmost dignity and respect. The work provided by the Order has made a significant contribution to the development of services and legislation that have helped to shape child welfare all across North America.

Amicus Conference of Major Superiors of Men (CMSM) is an association of the leadership of men in religious and apostolic institutes in the United States. The Conference has formal ties with the U.S. Conference of Catholic Bishops, the Leadership Conference of Women Religious, the National Assembly of Religious Brothers and other national agencies. CMSM represents U.S. male religious and apostolic communities before a number of national and international bodies, including the Congregation of Religious and Secular Institutes of the Holy See, which officially recognizes CMSM as the national representative body for men in religious and apostolic communities in the United States. CMSM addresses the life and concerns of religious and communities of apostolic life in the United States, including their evangelizing mission in the context of Church and culture in this country. CMSM is both a voice for major Superiors and a service to them:

> a) as a voice, it speaks regionally, nationally and internationally, independently or in concert with other groups; it does so from the perspective of male religious and members of apostolic

communities on issues regarding their life, as well as that of the Church and of our society;

b) as a service, it assists major Superiors in their role of leadership in their own communities and in the Conference as a whole, especially in promoting greater fidelity and more effective witness to the Gospel ideal.

Amicus American Friends Service Committee ("AFSC") is a Quaker organization that promotes lasting peace with justice, as a practical expression of faith in action. Founded in 1917 in Philadelphia, Pennsylvania, AFSC has nearly 100 years of experience building peace and supporting human dignity in communities worldwide, including long term engagement with a number of Native American communities. The AFSC has sought to build on the successes and learn from the grave failures that have taken place over three centuries of Quaker interactions with Native Americans, dating from the 1683 treaty between Pennsylvania's founder William Penn and the Lenape Indians, and including AFSC work across the country. AFSC has in particular gained deep understanding of the harm done to children, and to families and successive generations, by policies and practices that sought to remove and "civilize" Indian children, with devastating consequences for generations of Indian individuals, families, and communities until these practices were halted by the enactment and implementation of the Indian Child Welfare Act of 1978 ("ICWA"). Currently AFSC supports the work of a Truth and

Reconciliation Commission in Maine to promote learning, healing and still-needed policy change in the state to address the damaging impacts of the Maine child welfare system on Wabanaki people.

Amicus Disciples Justice Action Network is a multiracial, multi-ethnic and multi-generational ministry committed to promoting a passion for justice within the churches of the Christian Church (Disciples of Christ) and to providing prophetic Disciples leadership to ecumenical and interfaith coalitions working together for greater peace, justice, diversity and care for creation.

Amicus General Synod of the United Church of Christ is the representative body of the national United Church of Christ ("UCC") and is composed of delegates chosen by its Conferences, from member churches, voting members of Boards of Directors of Covenanted Ministries who have been elected by the General Synod as described in the Bylaws of the UCC, and of ex officio delegates. The UCC was formed in 1957 by the union of the Evangelical and Reformed Church and the General Council of the Congregational Christian Churches of the United States in order to express more fully the oneness in Christ of the churches composing it, to make more effective their common witness in Christ, and to serve God's people in the world. The UCC has approximately 5,200 local churches in the United States, with a membership of approximately 1.2 million. The General Synod of the UCC, various settings of the UCC, and its predecessor

denominations, have a rich heritage of supporting the rights of Native Americans and working to redress the injustices done to their tribal communities.

Some *Amici* were actively engaged in the legislative efforts that led to the 1978 enactment of ICWA[2], and supported the compelling rationale for its enactment and effective implementation.[3]

Amici's support for ICWA is informed by lessons learned from their, or their religious colleagues', varying, centuries-long involvement in the field of federal Indian affairs and policy.[4] Over the years, many of *Amici* have had first-hand and substantial involvement in nation-wide efforts to provide education, health and social welfare program benefits to Native Americans.

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[2] 25 U.S.C. 1901-1963.

[3] These *Amici* and other religious organizations lobbied in support of enactment of ICWA. As part of that effort, some *Amici* joined with other religious organizations in writing Congress on October 2, 1978 that the "... future of ... Indian people rests upon the survival of their families. They must be protected from unnecessary separations. This bill provides for both tribal jurisdiction over child placements and special consideration of Indian cultures and extended family structures."

[4] A zeal for the education of Indian children first took churches into Indian Country where great efforts were made by religious missionaries to assimilate Indians, without their consent, into mainstream society, which efforts *Amici* now find regrettable.

Child welfare is a field in which many individual members of *Amici* have long had personal involvement, including foster and adoptive care of Native American and other children. Many members of *Amici*'s organizations are adoptive parents.

When it became known in the mid-1970s that Indian child welfare policies were resulting in an alarmingly high rate of removal of Indian children from their Indian families and tribal communities, religious organizations, including some of those participating here as *Amici*, joined with Indian organizations to craft the provisions that were enacted as ICWA in 1978.

Recognizing that they had been complicit in the cause of the problem, religious organizations sought to be active in its repair, not unlike their leading engagement in the national debate between assimilation and sovereignty goals that preceded enactment of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. 461 *et seq.*, in the early twentieth century.[5] Just as the IRA was designed to stem the loss of Indian land, ICWA was designed to stem the loss of Indian children by rebuilding tribal government child welfare programs and restoring recognition of tribal authority over their own

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[5] *See*, generally the discussion at pages 3-15 in the Introduction to the book, David W. Baily, *Battle for the BIA: G.E.E. Lindquist and the Missionary Crusade against John Collier* (U. Ariz. Press 2004).

domestic relations. ICWA's support for tribal self-government and self-determination, and its preservation of invaluable opportunities for tribal membership accorded to individual Indians, are consistent with the federal Indian policies favoring tribal self-governance and self-determination which *Amici* actively have supported in recent decades.

SUMMARY OF ARGUMENT

Amici support ICWA and its continuing implementation and enforcement. ICWA implements sound federal Indian policies that deserve affirmation. ICWA facilitates the effective provision of child welfare program services by *Amici*, and is consistent with the federal Indian policies for which *Amici* have advocated.

ICWA provides certainty and finality for the welfare of Indian children. Its procedures have reversed previous trends toward demographic extinction by increasing the placement of Indian children within Indian communities and respecting the proper place of tribal governments in tribal domestic relations and child welfare matters.

ICWA procedurally protects the unique best interests of Indian children by helping to preserve their eligibility for tribal membership, which is their birthright of invaluable worth.

ARGUMENT

I. ICWA SOUNDLY IMPLEMENTS EFFECTIVE CHILD WELFARE POLICIES

Federal Indian policy has zigzagged through the past two centuries, veering from military campaigns to treaty-making to removals overridden by homesteading and assimilation, and turning back to the IRA[6] followed by termination. Finally, in recent decades, federal policy has recognized tribal self-governance and self-determination principles reflected in measures like ICWA.

ICWA's enactment enshrined in statute the spirit that has in modern times guided *Amici*'s involvement in Indian affairs -- that of support for tribal self-government and self-determination, tribal cultures and institutions, and protection of the unique, government-to-government relationship and trust obligation owed to tribal governments and their citizens by the United States. ICWA recognizes tribal government authority to be notified of any pending decision affecting the custody of a child who is a member of, or may be eligible for membership in, a tribe, and to have some measure of influence over that decision.

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[6] 25 U.S.C. 461 *et seq.*

II. ICWA PROVIDES CERTAINTY AND FINALITY FOR ALL INVOLVED

Amici acknowledge that the uncertainties generally accompanying the different requirements of different state laws can make adoption processes in America emotionally traumatic for all involved.

For adoptive parents, certainty and finality are usually of the highest priority. Likewise, certainty and finality are among the best interests of any child in need of an out-of-home placement.

ICWA provides great certainty and finality to Indian children, to their birth families and tribes, and to prospective adoptive parents. Its notice requirements and timeframes apply uniformly, as federal law, in every state. Uncertainty and lack of finality under ICWA arise only if its basic requirements are not followed.

ICWA's requirements reasonably can be met.[7] And they largely have been met in the tens of thousands[8] of ICWA-related placement decisions made since 1978. If a birth parent is identified with an Indian tribe, notice simply must be given to the

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[7] ICWA's requirements can be complied with as readily as can the varying requirements of the 50 states, the District of Columbia, and the various territories.

[8] U.S. Gov't Accountability Office, GAO-05-290, *Indian Child Welfare Act Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States*, 1 (2005).

child's tribal community of any proposed and involuntary out-of-home placement of the child.[9] If ICWA's notice provisions are adhered to, and its jurisdictional and intervention provisions and procedures for consent are complied with, virtually no ICWA-related adoption may be disturbed once it is finalized.[10]

An April, 2005 U.S. Government Accountability Office study concluded that ICWA's procedural requirements did not result in Indian children staying in foster care longer than their non-Indian peers.[11] Because its procedural requirements for involving a child's tribal community in placement decisions better address an Indian child's unique best interests, ICWA works well for Indian children and should be affirmed.

III. ICWA RESPECTS THE PROPER ROLE OF TRIBAL GOVERNMENTS IN TRIBAL DOMESTIC RELATIONS AND CHILD WELFARE MATTERS

Amici have devoted decades of charitable and philanthropic support to, as well as advocacy for, programs whose goals are to protect the best

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[9] 25 U.S.C. 1912(a). Most states similarly require notice to be given to a child's extended family.

[10] 25 U.S.C. 1913(d). As is customary in state domestic relations law, under ICWA a placement is final absent fraud or duress in the initial consent.

[11] GAO-05-290, 4.

interests of Native American children and to support tribal government authority. This support has focused both on shaping federal policy and on providing local program services to individual Native American children and their tribal communities. *Amici* work together for the common good in public and private settings, including promoting and defending public policy which aids their program services and protects the interests of those they serve.[12]

Amici are keenly and deeply committed to the constitutional guarantee of equal protection of the laws for all persons. *Amici* are likewise committed to the constitutional guarantees protecting tribal sovereignty and self-government against undue interference; and to safeguarding the unique federal trust responsibility towards tribal governments and individual Native Americans, including children.[13]

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[12] For example, *Amici* worked to support enactment of provisions successfully sought by tribal governments in the reauthorization of the Violence Against Women Act (2013) and of the American Indian Health Care Improvement Act (2010), and the enactment of the Tribal Law and Order Act of 2010.

[13] For example, *Amici* FCNL's legislative policy states: "Friends have long sought to honor William Penn's commitment to live 'a kind, just and peaceable life' with Native Peoples. In this spirit ... we encourage respectful relations with Native peoples. ... The tribal governments established by Native Americans are entitled to set policies that govern life on reservations and that affect tribal members who live off reservations."

ICWA carefully balances these twin constitutional principles.

Our long and winding road through American history, informed by our decades of relationships with Indian tribes, has convinced *Amici* that the well-being of Indian Country and its rich and varied cultures requires our Nation to recognize the tribal authority and autonomy embedded in laws like ICWA to help strengthen tribal self-sufficiency and responsibility. Indian families are the bedrock of Indian communities, and only by remaining in relationship with its Indian children may a tribe avoid extinction. Without children, tribal membership shrivels and a tribe withers away.

IV. ICWA PROPERLY PROTECTS THE UNIQUE BEST INTERESTS OF INDIAN CHILDREN

Petitioners' cause directly challenges the Respondents' unique status as Indians. Petitioners would have this Court set aside ICWA as constitutionally infirm, asking the Court to strip Indian children of ICWA's procedural protections of their birthright.

Chief among the birthrights of an Indian child is the right of franchise, to vote and otherwise influence the decisions made by an individual Indian's tribal government. Of comparable import is the panoply of rights, benefits and privileges which vest in individual tribal members by federal or tribal

law. These in some instances may include monetary transfers or other material benefit distributed by a tribe to its members, and sometimes may involve employment preferences in the federal or tribal workforce, education and training benefits, health and social services which arise from treaty and trust responsibilities taken on by the federal government in exchange for land and resources.[14]

As this Court previously has affirmed, each Indian tribe determines its own requirements for an eligible person to be admitted to tribal membership.[15] In some instances, an individual Indian may be eligible for membership but because of a lack of personal ties to an Indian community or of demonstrations of personal interest, may not be admitted to membership or invited to be admitted.[16]

ICWA applies to a child who is a member of a tribe or is eligible for tribal membership.[17] That

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[14] This opportunity for invaluable material and non-material benefits by fate of birth is not unlike that presaged in the ancient Bible story recounting Jacob's theft of Esau's birthright in *Genesis*, 25:29-34

[15] *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 54-55 (1978). Self-government and determinations of tribal membership are at the heart of tribal sovereignty.

[16] Tribal membership is by no means imposed upon an individual. While *membership* is a privilege, not a right, *eligibility* to be considered for membership is a birthright.

[17] 25 U.S.C. 1903(4) defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of

(footnote continued on next page)

eligibility is an Indian child's birthright. While not alone sufficient for tribal membership, eligibility is necessary for tribal membership.

Native American children possess a unique birthright. Removal from their Indian community and culture at a young age will very likely sever their personal, social, and political link to their birthright, and practically foreclose a choice to pursue tribal membership -- a choice a child might desire to make in adulthood. Wresting a child from his or her tribal birthright context without any regard to the desires of the child's extended family and cultural community, and without regard to the impact removal will have on any future choice by the child to pursue tribal membership, is precisely the practice that was repudiated by Congress in 1978 in its enactment of ICWA. Without an opportunity to grow up in his or her tribal community and participate in its cultural, social, and political life, an Indian child's birthright of eligibility may never ripen.

Properly implemented, ICWA does not predetermine placement decisions. Rather, ICWA requires only that a placement decision take into

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an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." Accordingly, ICWA must be read to apply to custodial decisions made for an "Indian child" regardless of his or her current custodial context. Otherwise, the Act's stated intention to stem the alarming rate of removals could be easily thwarted.

account the unique best interests of an Indian child, including the right to have his or her extended family and tribal community participate in a placement decision that the Indian child in its tender years cannot make.

CONCLUSION

Amici supported enactment of ICWA in 1978 precisely to secure its explicit statutory recognition of the unique political status accorded Indian tribes and their authority over tribal domestic relations, both in the sense of self-government over matters involving individual members of an Indian tribe, and in the more specific sphere of family law. For these same reasons, *Amici* urge the Court to uphold effective implementation of ICWA and affirm the lower court's placement of the Baby Girl in this case with her Indian birthfather.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, a Minor Under The Age of Fourteen Years, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF THE HAMLINE UNIVERSITY SCHOOL OF LAW CHILD ADVOCACY CLINIC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS BIRTH FATHER AND THE CHEROKEE NATION

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QUESTIONS PRESENTED

1. Should the policy goals of the Indian Child Welfare Act be followed to protect the best interests of Indian children?

2. To protect the best interests of Indian children, must Guardians ad Litem consider the Indian Child Welfare Act and the unique needs of Indian children when making their recommendations regarding adoption or permanent placement of an Indian child?

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INTRODUCTION

A Guardian ad Litem has an obligation to the judicial system to provide a fair and unbiased report to the judicial officer as to a child. When that child is an Indian child, the Guardian ad Litem must consider the best interests of an Indian child and all that encompasses that definition under the ICWA. In that sense, the cultural tribal connections of the Indian child become an integral part of the Guardian ad Litem's assessment of the case. In the instant case, the Guardian ad Litem did not make an assessment based on the best interests of the Indian child.

INTEREST OF THE *AMICUS CURIAE*[1]

The Hamline University School of Law Child Advocacy Clinic (HUSL), founded in 1993, is a non-profit legal clinic dedicated to protecting the best

[1] Pursuant to Rules 37.3 and 37.6 of the Rules of the Supreme Court, all parties have consented to the filing of this *amicus curiae* brief. Letters of consent to the filing of all *amicus curiae* briefs were filed by each party with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

interests of children. The Child Advocacy Clinic furthers this purpose through zealous advocacy and representation in multiple capacities including: acting as Guardians ad Litem (hereinafter GAL) in child protection matters; representing GAL, particularly those acting as guardians for cases governed by the Indian Child Welfare Act (hereinafter ICWA); and representing clients in adoptions and third-party custody cases.

The Child Advocacy Clinic submits this brief of *amicus curiae* on behalf of Indian children in an effort to protect their best interests by ensuring that the policy goals of the ICWA are followed and that reunification with their parents or placement with extended family and tribes remains the goal of the various courts involved. Further, the amicus submit this brief to protect those interests and clarify the expected recommendations of Guardians ad Litem on cases governed by the ICWA when presented with an adoption or permanent plan for placement of an Indian child.

SUMMARY OF ARGUMENT

The Indian Child Welfare Act was enacted to prevent the injustice of removing Native American children from their homes and subsequently placing them in non-Native homes with no regard for their culture, heritage, and traditions. There are two factors that can ensure the best interests of Native

American children are protected: first, the policy goals of the ICWA must be followed; and second, guardian ad litems must consider the ICWA and the unique interests of the Indian child when making recommendations to the court. *The National CASA Association Volunteer Training Curriculum Volunteer Manual,* CASA for Children, Chapter 3, 2007. See also http://nc.casaforchildren.org/files/public/community/judges/July_2010/Connection_Winter2009.pdf and http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5525161/k.3114/Keeping_Native_Children_Connected.htm.

First, the policy goals of the ICWA must be followed so that the best interests of Indian children are protected. Prior to the enactment of the ICWA, large numbers of Indian children were removed from their families. These removals were not due to abuse or neglect, rather non-tribal government authorities were removing children because of their lack of understanding and their bias against Native people's customs and culture. The removals resulted in Indian children being denied access to their Native culture and losing their Indian identities. Also, the tribes were losing their future leaders and members. Therefore, the policy goals behind the ICWA serve to protect both the interests of Native American tribes in maintaining strong connections with their future generations and the best interests of Indian children in being raised by their Native American families with access to culture and heritage. In this case, the policy goals of the ICWA were violated when Baby Girl was placed for adoption based on the single

decision of a non-native person and this decision was enforced by a non-native GAL who did not address Baby Girl's best interests as an Indian child.

Second, a guardian ad litem must consider the ICWA and the unique interests of the Indian child when they make recommendations to the court. When a GAL is first appointed to an ICWA case, she should have knowledge and an appreciation of the social and cultural standards of the Indian community where the parent or extended family reside or maintain social and cultural ties. In general, the role of a GAL is to represent the best interests of the Indian child by conducting an independent, balanced, and impartial investigation so the GAL can determine the facts relevant to the family situation. In an ICWA case, the GAL must focus on the heightened best interest standard for an Indian child, which requires the GAL to be familiar with the policies of the ICWA and to have an understanding of Native American culture. When making the report to the court regarding an ICWA case, a GAL must make final recommendations that will ensure that the Indian child is connected to their family, culture, heritage, and tribe. The placement preferences in the ICWA exist to ensure the best interests of the Indian child are protected and a GAL would never serve an Indian child's best interest by ignoring those requirements for placement when good cause does not exist. *National CASA,* supra at v3-3.

In this case, the GAL acted without consideration of the child's Native American culture. The GAL also minimized and ignored Baby Girl's heritage as a

Native American. That omission does not protect Baby Girl's best interest in maintaining connection to her culture and tribal family. The GAL's actions and recommendations not only violated the ICWA but also ignored Baby Girl's best interests which could have resulted in future harm. As an Indian child, Baby Girl's best interests include a placement with her biological father and the opportunity to be connected to her tribal culture.

ARGUMENT

I. To Protect the Best Interests of Indian Children the Policy Goals of the ICWA Must be Followed

At its core, the Indian Child Welfare Act was enacted to prevent the precise injustice which has occurred in the case before the court: removal of Native American children from their homes and subsequent placement into non-Native homes, without regard for the culture, heritage and traditions of those Indian children and their families.

A. History and Purpose

The need for the ICWA arose in the mid-1970's as Congress took notice of "the separation of large numbers of Indian children from their families and tribes and the subsequent consequences these Indian children, families and tribes faced as a result." *Mississippi Band of Choctaw Indians v. Holyfield*, 490

U.S. 30, 32 (1989). Studies conducted at the time uncovered that "25 to 35 percent of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions." *Id.* (quoting Indian Child Welfare Program Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3). The majority of the placements for these Indian children were with non-native homes and ultimately caused them to lose connection to not only their families and tribes, but their cultural heritage as well. *Id.* at 33-34. Not only were Indian children being denied access to their Native culture, they were losing their Indian identities, and tribes were losing potential future leaders. 25 U.S.C. § 1901; 124 Cong. Rec. 38, 102 (1978); *see also, Holyfield.*

It was in response to this crisis that the Indian Child Welfare Act of 1978 was enacted by Congress. The ICWA states as its purpose:

> "[t]he Congress hereby declares that it is the policy of this Nation to protect the best interest of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family programs."

25 U.S.C. § 1902. With its purpose and policy goals in mind, Congress was deliberate as it crafted the specific provisions of the ICWA. "The entire legislative history makes it clear that the Act is directed primarily at attempts to place someone other than the parent or Indian custodian in charge of raising an Indian child." "Guidelines for State Courts; Indian Child Custody Proceedings, Part III (Notices)." Federal Register 44:228 (Nov. 26, 1979) p. 67587.

B. Placement/Reunification With Indian Family is in the Best Interest of Indian Children

At the time the ICWA was enacted, Indian children were being removed from their homes not because of abuse, but because the removal was conducted by "nontribal government authorities who ha[d] no basis for intelligently evaluating cultural and social premises underlying Indian home life and childrearing." *Holyfield*, at 34-35. The workers would allege neglect or maltreatment simply because the ways of the Native American family did not comport with their own Anglo-Saxon beliefs on child rearing. *Id.* at 33.

Though the case at hand does not involve allegations of abuse or neglect, but rather the adoption of an Indian child, the ICWA and its goals and policies are still applicable, and must be followed in order to insure the continued protection of the best interest of Indian children. Results of a survey conducted in 1969 revealed that 85% of Native American children residing

in foster homes had been placed in non-native homes, and about 90% of Indian children adopted by nonrelatives went to non-Native American adoptive homes. *Id.*

In an effort to change this trend, the ICWA speaks directly to preference criteria for adoptive placements. Section 1915 of the ICWA states that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." 25 U.S.C. § 1915(a). These placement preferences are of paramount importance for Indian children, because if they are denied access to their culture and heritage, their ultimate wellbeing may be at risk of negative impact.

> Psychologists and sociological studies have suggested that Native American children brought up in non-native homes suffer from a variety of adjustment disorders once they discover their unique racial ancestry. They eventually long to discover their indigenous roots, and this longing often results in maladaptive behavior, contributing little to either the dominant society or the native traditions.

B.J. Jones, The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children 4-5 (Section of Family Law, American Bar Association 1995) (citation omitted).

Baby girl was not only moved hundreds of miles away from her birthplace, but she was also placed for

adoption without regard for her Native American heritage. Furthermore, the impact to Baby Girl of denying her the opportunity for a life of exposure to her Indian culture was not considered. The policy goals behind the ICWA serve to protect the interests of Native American tribes in maintaining strong connections with their future generations and the best interests of Indian children in being raised by their Native American families with access to their cultures and heritage. See http://nc.casaforchildren.org/files/public/community/judges/July_2010/Connection_Winter2009.pdf. It is undeniably unfortunate that Baby Girl had to go through the experience of being removed from the home of the adoptive couple; however, that removal was necessary in order to ensure that her best interests were adhered to and considered as well as the immediate consequences. By applying the ICWA, Baby Girl's best interests were considered and protected.

II. To Protect the Best Interests of Indian Children, Guardians ad Litem Must Consider the Indian Child Welfare Act and the Unique Needs of Indian Children When Making Their Recommendations Regarding the Adoption or Permanent Placement of an Indian Child

A. Guardian ad Litem's Role

The role of a guardian ad litem is to "represent the best interest of the child" by "conducting an independent, balanced, and impartial investigation to

determine the facts relevant to the situation of the child and the family." S.C. Code § 63-3-830(A)(1-2). A guardian ad litem's investigation must include, but is not limited to:

> "(a) obtaining and reviewing relevant documents . . . ; (b) meeting with and observing the child on at least one occasion; (c) visiting the home settings if deemed appropriate; (d) interviewing parents, caregivers, school officials, law enforcement, and others with knowledge relevant to the case; (e) obtaining criminal history of each party when determined necessary; and (f) considering the wishes of the child, if appropriate."

S.C. Code § 63-3-830(A)(2)(a-f). A guardian ad litem, once they have conducted their investigation, is also given the responsibility of presenting that information to the court in a clear and concise written report regarding the child's best interest. S.C. Code § 63-3-803(A)(6). In other jurisdictions, special emphasis is made as to the GAL duties when the ICWA is involved. For example, the Minnesota Judicial Branch Policy, Guardian ad Litem System Program Standards speaks specifically to this point.

> All pertinent factors shall be considered in the identification and selection of the guardian ad litem to be appointed, including the age, gender, race, culture, heritage, and needs of the child; the cultural heritage, understanding of ethnic and cultural differences, background, and expertise of each

> individual guardian ad litem, as those factors are related to the needs of the child . . .

they go on to further state, "[n]o person shall be appointed as a guardian ad litem in any case governed by the Indian Child Welfare Act or the Minnesota Indian Family Preservation Act unless that person demonstrates knowledge and an appreciation of the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." Minnesota Rules of Guardian ad Litem Procedure. Thus, the GAL in a case involving an Indian child must pay attention to the unique tribal connection of an Indian child. See *National CASA* at p. 10, "Understanding the Justice of ICWA".

B. Best Interest Factors

When conducting an investigation, a guardian ad litem must evaluate all factors that are relevant in determining the best interests of a child. This may include inquiry into "the character, fitness, attitude, and inclinations on the part of each parent as they impact the child," as well as "psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life." *Woodall* v. *Woodall*, 322 S.Ct. 7, 11 (1996). However, when a Guardian ad Litem is appointed to a case that is governed by the ICWA, they must take

into consideration additional factors when determining what is in the Indian child's best interest.

The ICWA provides a back drop for determining the best interest of the Indian child. ICWA was created by Congress to give great weight to the Native American culture and traditions of the child. When a guardian ad litem has been appointed to an ICWA case, it is their job to advocate for the best interest of that Indian child. This requires that the Guardian ad Litem be familiar with the policy considerations embodied in the ICWA, and that they have an understanding of the relevant Native American culture. *Id.*

C. Actions/Decisions of the GAL in this Case

From the outset, the GAL's work on Baby Girl's case was troubling. These troubling aspects extend beyond the obvious impropriety due to previous relationships that the GAL had with parties involved in the case. her actions after her appointment were even more cause for concern. Transcript of the Record at 591-592, Vol. 1-5, *Adoptive Couple* v. *Baby Girl*, 398 S.C. 625, 731 S.E.2d 550 (2012). The decision of the GAL, while investigating the two potential placements for Baby Girl, to determine that it was not "necessary" to visit the potential tribal home of Baby Girl's father, is disquieting. Tr. 632. Visiting the biological father's home would have allowed the GAL to obtain an accurate representation of what Baby Girl's life would be like and how her best interests would be affected. After repeated requests from

father's attorney, the GAL eventually did visit the father's home. While at the father's home, the GAL chose to disclose information to the father and his family regarding the prospective adoptive couple who were caring for Baby Girl. The GAL informed the paternal family of how beautiful the home of the adoptive couple was; their high levels of education and the couple's ability to send Baby Girl to private school. Tr. 567-568. The GAL also told the family that they needed to "pray" about making the right decision for Baby Girl. Tr. 570. Such actions suggest that the GAL's investigation was not a neutral and objective investigation of what was in Baby Girl's best interests as an Indian child.

Baby Girl's best interests were not represented by the appointed Guardian ad Litem where Baby Girl's best interests *as an Indian child* were altogether ignored. Because Baby Girl qualifies as an "Indian child" under the ICWA, the GAL was charged with an additional responsibility to bring to light for the court that Baby Girl be placed in a home in which she could have access to and nurture her cultural heritage. The GAL overlooked this duty. Rather than conducting an "independent, balanced, and impartial investigation" taking into consideration the degree of importance that Baby Girl's Cherokee heritage played in the determination of her best interests, the GAL allowed her own cultural and economic biases to impact the investigation and recommendations. The ICWA was enacted specifically to address that state "judicial bodies . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and

social standards prevailing in Indian communities and families." *Holyfield* at 45.

The initial report that the GAL submitted to the court on behalf of Baby Girl's best interests, failed to even mention Baby Girl's Native American heritage. Tr. 631. The GAL's testimony was that she did not believe that Baby Girl's Indian heritage was important and that the court did not need to even consider it. Tr. 634. In the GAL's deposition about the extent of her knowledge of the Native American culture and conversations she had with Baby Girl's father regarding it, the GAL stated that she had talked to him about "their little get togethers, and little dances." Tr. 634. The GAL's lack of appreciation for Indian community standards was evident in the written report which stated her concerns regarding Baby Girl's biological father. Two prominent concerns that the GAL noted centered on the father living in his parents' home rather than his own. His ability to "provide for two children independently of his parents provisions" was also stated as a concern. Guardian ad Litem Report at 810, Transcript of the Record, Vol. 1-5, *Adoptive Couple* v. *Baby Girl*, 398 S.C. 625, 731 S.E.2d 550 (2012). The GAL's lack of understanding of the common practice in Native American cultures for families to live with and support each other is evidenced by that concern. In contrast, the GAL did not express concern that if Baby Girl remained in the adoptive home, she not only would be in a home that was non-native, but she also would be hundreds of miles away from any of her biological relatives.

When making recommendations to the Court regarding a case governed by the ICWA, it is imperative that the guardian ad litem be a zealous advocate not only for the child's best interests, but also for the unique needs of the "Indian child." A guardian ad litem on an ICWA case must make a final recommendation that will protect and ensure the Indian child is as exposed and connected to their family, culture, heritage and tribe. The GAL must consider the policy considerations behind the ICWA.

It is for these reasons, that the placement preferences in the ICWA exist. The preferences are needed to ensure that the best interests of Indian children are protected. The Guardian ad Litem should be following the placement preferences of the ICWA and considering tribal heritage in making recommendations.

CONCLUSION

For these reasons, the South Carolina Supreme Court's decision should be upheld.

Dated: March 26, 2013

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECD
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BRIEF OF AMICI CURIAE BONNIE AND SHANNON HOFER; ROGER, LOREAL, AND SIERRA LAUDERBAUGH; AND CRAIG AND ESTHER ADAMS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63, applies to state-custody proceedings involving an Indian child. A dozen state courts of last resort are openly and intractably divided on two critical questions involving the administration of ICWA in thousands of custody disputes each year:

1. Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

2. Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

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INTEREST OF THE AMICI

Amici consists of non-Indian adoptive parents and an Indian child who have all been harmed by ICWA's racial-preference system for child custody.[1] All parties to this case have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Congress passed the Indian Child Welfare Act (ICWA) in 1978 to stop the unjustified removal of Indian children from their biological parents' homes on tribal land by state child-protection agencies. But as Petitioners' case and Amici's own experiences show, the racial-preference system that Congress created in ICWA to stop wrongful removals is now unfairly hindering the adoption of children with Indian blood heritage by non-Indian parents – regardless of whether the best interests of the child are objectively served by the adoption or not.

The effects of ICWA in otherwise proper adoptions violate the equal-protection and due-process rights of children with Indian blood. Thus, while Petitioners seek relief from such interference based

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity other than amici curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

on a narrow reading of ICWA that avoids the need for further constitutional review, Amici respectfully submit that this Court should instead hold that ICWA's racial-preference system for Indian child custody is unconstitutional. Children with Indian blood merit the same legal protections as other children.

ARGUMENT

I. Under ICWA, race dictates who may take custody of any child with Indian blood.

The Indian Child Welfare Act of 1978[2] (ICWA) serves to "protect the rights of the Indian child *as an Indian*. . . ." H. R. Rep. No. 95-1386, at 23 (1978). ICWA advances this goal in two main ways. *First*, ICWA enhances the authority of Indian tribes to influence and assume control over legal proceedings concerning the custody of an "Indian child" – a racialized term that ultimately includes any child with Indian blood heritage. *See* 25 U.S.C. § 1911 (2012). *Second*, ICWA requires state courts to generally favor Indian custody of an "Indian child" and imposes high burdens of proof on anyone daring to challenge this presumption. *See, e.g.*, *id.* § 1912(e), (f). ICWA thus lets race dictate who may assume custody of a child with Indian blood heritage – even if this

[2] Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (2012)).

runs counter to the child's best interests or, quite often, the wishes of the child's biological parents.

A. ICWA governs any child "eligible for membership in an Indian tribe," and Indian tribes largely define membership eligibility based on race.

ICWA governs all legal proceedings that pertain to the custodial status of an "Indian child." In turn, ICWA defines "Indian child" as follows:

> "Indian child" means any unmarried person who is under age eighteen and is either:
>
> (a) a member of an Indian tribe or
>
> (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

Id. § 1903(4).

In practical terms, this definition of "Indian child" allows ICWA to govern the custody of any child whose blood heritage – along with that of a biological parent – can be traced to a recognized Indian tribe. This is because numerous Indian tribes define their membership in purely racial terms – something they have "broad authority" to do. *Rice v. Cayetano*, 528 U.S. 495, 527 (2000) (Breyer, J., concurring).

For example, three of the five largest Indian tribes (by enrollment[3]) now recognized under federal law – the Cherokee Nation, the Choctaw Nation of Oklahoma, and the Muscogee (Creek) Nation[4] – limit membership to only those individuals who can trace their lineage to one of the tribe's original enrollees on the "blood rolls" compiled by the Dawes Commission in 1906.[5] This constitutes a virtual "one drop"-rule[6] for tribal membership that lets the Cherokee Nation (for example) count "blond people who are 1/1000th Cherokee" as members, even if they are not connected to the tribe in any meaningful way.[7]

Other Indian tribes limit membership to individuals who can prove they have a specific "quantum" of

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[3] *See generally* U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, 2005 AMERICAN INDIAN POPULATION & LABOR FORCE REPORT 27-39 (2005) (listing enrollment numbers).

[4] *See* CONST. OF THE CHEROKEE NATION, art. IV, § 1; CONST. OF THE CHOCTAW NATION OF OKLA., art. II, § 1.; CONST. OF THE MUSCOGEE (CREEK) NATION, art. III, § 2.

[5] *See generally* KENT CARTER, THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893-1914, at 49 (1999) (describing the history of the Dawes Rolls).

[6] SCOTT MALCOLMSON, ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE 16 (Farrar, Straus & Giroux, 2001) ("The [Cherokee] . . . will not recognize anyone as Cherokee who does not have an ancestor on the Dawes rolls, though all it takes is one drop of blood.").

[7] Evelyn Nieves, *Putting to a Vote the Question "Who Is Cherokee?"* N.Y. TIMES, Mar. 3, 2007, http://www.nytimes.com/2007/03/03/us/03cherokee.html (quoting Marilyn Vann, President, Descendants of Freedmen of the Five Civilized Tribes).

Indian blood. Thus, to be a member of or eligible for membership in the Navajo Nation – the largest tribe recognized under federal law[8] – one must possess at least one-quarter Navajo blood. This means having, for example, one grandparent who is a "full-blooded" Navajo or two parents who each have one-quarter Navajo blood.[9] The degree of "blood quantum" required for membership varies among tribes from as much as one-half[10] to as little as one-sixteenth.[11] The Bureau of Indian Affairs aids tribes in enforcing these blood quantum degrees through the issuance of special certificates.[12]

Accordingly, for most Indian tribes, blood – and blood alone – serves to determine who belongs to the tribe. By contrast, political criteria like residency, knowledge of civic customs, and civic participation

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[8] *See supra* note 3.

[9] *See* Paul Spruhan, *The Origins, Current Status, & Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation*, 8 TRIBAL L.J. 1, 5 (2007).

[10] Indian tribes requiring one-half blood quantum include the Mississippi Band of Choctaw Indians and the St. Croix Chippewa Indians. *See* CONST. OF THE MISS. BAND OF CHOCTAW INDIANS, art. III, § 1; CONST. OF THE ST. CROIX CHIPPEWA INDIANS OF WIS., art. III.

[11] Indian tribes requiring one-sixteenth blood quantum include the Fort Sill Apache and the Confederated Tribes of Siletz Indians. *See* CONST. OF THE CONFEDERATED TRIBES OF SILETZ INDIANS OF ORE., art. I, § 1(B); CONST. OF THE FORT SILL APACHE TRIBE OF OKLA., art. II, § 1(c).

[12] *See* Genealogy, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/FOIA/Genealogy/ (last visited Feb. 8, 2013).

are seemingly irrelevant.[13] Given this reality, it must be recognized that "children who are related by blood to . . . [Indian] tribe[s] may be claimed by the[se] tribe[s], and thus made subject to the provisions of ICWA, solely on the basis of their biological heritage. *Only children who are racially Indians face this possibility.*" *In re Bridget R.*, 41 Cal. App. 4th 1483, 1509 (Cal. Ct. App. 1996) (emphasis added).

B. ICWA enforces the racial presumption that Indians are the most appropriate custodians for any child with Indian blood.

Race defines not only ICWA's reach – encompassing virtually any child with the requisite amount of Indian blood – but also its grasp. In particular, ICWA requires state courts to presume that the most appropriate custodian for a child with Indian blood is an Indian tribal member. ICWA imposes this presumption in two ways. *First*, ICWA requires that preference be given to tribal custodians in foster care, preadoptive, or adoptive placements of children with Indian blood. *Second*, ICWA makes it very difficult for non-Indians to take custody of a child with Indian blood unless certain high evidentiary burdens are met.

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[13] *See, e.g.*, Application Instructions for Tribal Registration, CHEROKEE NATION, http://www.cherokee.org/Docs/Org2010/2012/8/31660Application_Instructions.pdf (last visited Feb. 8, 2013) (indicating lineage is sole criteria to join Cherokee Nation).

Custodial Preferences – ICWA dictates that state law must afford preference to the following types of custodians as adoptive placements for children with Indian blood: "(1) a member of the child's extended family; (2) other members *of the Indian child's tribe*; or (3) other *Indian families*." 25 U.S.C. § 1915(a) (2012) (emphasis added). ICWA establishes a similar regime of preferences with respect to foster-care placements of such children, favoring "a member of the Indian child's extended family" first, followed by foster homes and similar institutions for children approved of "by the Indian child's tribe" or otherwise operated by Indians. *Id.* § 1915(b).

ICWA thus requires states to treat Indian tribal members as the most preferred custodian for any child with Indian blood. This preference in turn is inextricably linked to the racial criteria for tribal membership described *supra*, Part I.A (i.e., "blood roll" lineage and "blood quantum" degrees). *See id.* § 1903(3). And such racial criteria also bear directly upon the "extended-family" placements that ICWA prescribes. Indeed, ICWA leaves the term "extended family member" to be defined by "the law or custom of the Indian child's tribe." *Id.* § 1903(2).

In addition to prescribing a set of racially-driven custodial preferences for children with Indian blood, ICWA insulates these preferences from challenge. Indeed, ICWA dictates that these preferences may only be disregarded for "good cause." *Id.* § 1915(a),

(b). ICWA does not define "good cause,"[14] but several state courts have ruled that "good cause" does not include the simple determination that "placement outside [ICWA's] preferences would be in the child's best interests." *In re Custody of S.E.G., A.L.W., & V.M.G.*, 521 N.W.2d 357, 362 (Minn. 1994); *see also In re C.H.*, 997 P.2d 776, 784 (Mont. 2000).

Evidentiary Burdens – Ultimately, the exception for "good cause" noted above is one of several burdens-of-proof in ICWA that operate to make it very hard for non-Indian adoptive and foster parents to obtain or maintain custody of children with Indian blood – even if deep bonds already exist between those adults and the child. These burdens of proof exist on three levels.

First, ICWA requires foster or adoptive parents vying for the custody of a child with Indian blood to prove that "serious emotional or physical damage" would likely result to the child if left in the care of an applicable Indian custodian. 25 U.S.C. § 1912(e), (f). For foster-care placements, such risk-of-harm must be proven by "clear and convincing evidence." *Id.* § 1912(e). And for adoptive placements involving the termination of an Indian parent's rights, such risk-of-harm must be proven by "evidence beyond a reasonable doubt." *Id.* § 1912(f). Together, these high burdens

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[14] The Bureau of Indian Affairs does provide non-binding guidelines for reading ICWA. *See* Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

rig the legal inquiry surrounding custody of a child with Indian blood to favor Indian custodianship. *See, e.g.*, *In re A.P.*, 961 P.2d 706, 713 (Kan. Ct. App. 1998) ("[ICWA's] standard is more stringent than the requirements for termination of the rights of non-Indian parents under [Kansas] law.").

Second, ICWA prevents courts from determining that Indian custodianship would threaten "serious emotional or physical damage" to a child with Indian blood unless a "qualified expert witness" agrees. 25 U.S.C. § 1912(e), (f). ICWA does not define this term, but several state courts have read "qualified expert witness" to mean a witness versed in "tribal culture and values." *In re Appeal in Pima Cnty. Juv. Action No. S-903*, 635 P.2d 187, 192 (Ariz. Ct. App. 1981); *see also In re Welfare of B.W.*, 454 N.W.2d 437, 444 (Minn. Ct. App. 1990) (listing cases). Consequently, this tribe-favoring evidentiary requirement further tilts the scales against non-Indian parents seeking custody of children with Indian blood.

Third, and finally, ICWA dictates that no foster placement or termination of parental rights related to a child with Indian blood may take place until a court finds the state has made "active efforts . . . to prevent the breakup of [the child's] Indian family and that these efforts . . . proved unsuccessful." 25 U.S.C. § 1912(d). ICWA does not define what "active efforts" means, but state courts applying ICWA make it clear that non-Indian foster or adoptive parents of children with Indian blood stand to lose those children if the state has failed to make sufficient "active efforts."

See, e.g., C.J. v. State Dep't of Health & Social Servs., 18 P.3d 1214, 219 (Alaska 2001).

Ultimately, many of the race-based custodial preferences and evidentiary burdens described above can be traced to a central source: junk social science. In 1978, ICWA's main proponents relied on a study by social psychiatrist Dr. Joseph Westermeyer to convince Congress that "Indian adoptive parents [were] better able than their non-Indian counterparts to give Indian children a proper upbringing."[15] As legal scholar Randall Kennedy explained in a recent book on race and adoption, Westermeyer's study is anything but "rigorous social science."[16] Instead, this study reflects a pernicious combination of poor data collection and "utterly subjective musings."[17] Yet, the effects of this junk science continue to live on in the enforcement of ICWA's racial-preference system. *See, e.g., Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 n.1 (1989) (citing Westermeyer).

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[15] RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, & ADOPTION 499 (Pantheon, 2003).

[16] *Id.* at 503.

[17] *Id.* Kennedy reveals that Westermeyer's study was based on nothing more than Westermeyer's observation of "a small sample of psychiatrically troubled patients." *Id.* at 502.

II. ICWA's racial-preference system for child custody threatens otherwise proper adoptions of children with Indian blood.

Petitioners in this case are a couple who have suffered the consequences of the racial-preference system by which ICWA regulates the custody of children with Indian blood. Indeed, these non-Indian parents have lost custody of their adopted daughter just because of her Indian bloodline – and despite her non-Indian mother consenting to this adoption and her Indian father abandoning her since birth. But what makes this case most disturbing is just *how ordinary it is*. In short, this case is just one more heartbreaking tragedy in ICWA's thirty-year history of putting tribal interests ahead of the best interests of the child. Amici's experiences with ICWA are no exception, thus further illuminating the variety and extent of injustice that ICWA makes possible.

A. Amici Bonnie and Shannon Hofer's ICWA experience.

Bonnie and Shannon Hofer are a married couple who live in a rural area of southwest Minnesota. In September 2002, with one small child of their own, the Hofers learned at their church that an Indian mother was looking for an adoptive home for her twenty-month-old boy. The boy's father was an illegal immigrant who had been deported. This was the second time that this mother (JGB) had tried to find a home for her son (CGB) through the church. Another

couple in the church were already caring for JGB's older children.

The Hofers took the boy into their home and agreed to adopt him. They retained an attorney to guide them through the adoption process; another attorney represented the mother. Through their attorneys, the Hofers and the mother completed nearly all of the paperwork for adoption, including a home study, consent forms, and an offer of counseling services for the mother. The mother testified under oath that she did not want her son placed in foster care; instead, she wanted him to bond with the Hofers (who are not Indian).

In October 2002, the state court in Minnesota granted the Hofers custody of CGB pending final adoption. The Hofers then filed an adoption petition and the Hofers' lawyer asked the mother, JGB, to return a medical-and-social-history form that was part of the petition. The lawyer also contacted a representative of the Three Affiliated Tribes in North Dakota, of which JGB was believed to be a member, to determine the tribe's stance. The Hofers' attorney received no response from the tribe or JGB.

This lack of response continued until April 2004, when a new lawyer for the Hofers advised them to seek termination of JGB's parental rights so the adoption could be completed. The Hofers filed a petition to this effect. Then, after CGB had been raised by the Hofers for two years, his biological mother reemerged with the support of a new lawyer

and lawyers for her tribe, demanding that CGB be returned to her custody and invoking ICWA's special restrictions on the placement and adoption of Indian children as the legal basis for their demand.

Relying on the placement preferences of ICWA, a Minnesota state-court judge initially ordered that CGB be returned to JGB's custody pending trial. The Hofers and the guardian ad litem for CGB ultimately succeeded in persuading the court to stay that order and allow CGB to stay with his adoptive parents until trial. While preparing for trial, the Hofers and the guardian learned a great deal about the difficult and unstable lives of JGB and her four children (her other children were two, nine, and ten years of age when CGB was born).

The father of JGB's first three children was a severe alcoholic (he has since passed away). JGB's first three children lived much of their lives with an non-Indian couple who lived seventy miles from JGB. JGB placed CGB in the care of other non-Indians before she found the Hofers. One person, whom JGB met at a county fair, took care of CGB for ten months. JGB had no connections with the tribe, which was over 500 miles from her home.

All of this information was presented to the state court through affidavits and testimony before trial, during an intense period of emotional turmoil for

everyone involved, including the child.[18] After all of these filings and several hearings – and after JGB had been allowed to visit with CGB and thereby witness his strong emotional attachment to the Hofers – the biological mother agreed to voluntarily terminate her parental rights, thus finally letting the Hofers complete their adoption of CGB.

If CGB had not possessed Indian blood – and thus not been subject to ICWA – he would have received very different and heightened protection under the law. If ICWA's presumptions and standards had not applied, JGB's abandonment of CGB for long periods of time – including during the two years before the Hofers filed their petition – would have presumptively led to termination of her parental rights.

B. Amici Roger, Loreal, and Sierra Lauderbaugh's ICWA experience.

Sierra Lauderbaugh was an Indian child (she is now an adult) and member of the Leech Lake Band of Ojibwe in central Minnesota. She was in foster care from the age of ten until she was finally able to be adopted, at 17, by her third foster family (Roger and Loreal Lauderbaugh). Sierra and two of her brothers

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[18] *See* Guardian Ad Litem's Memorandum of Law with Affidavits of Even, et al. and Reports of the Guardian Ad Litem, *In re Child of JLG*, No. 41-J5-04-50019 (Minn. Dist. Ct. June 16, 2005).

had been removed from their biological Indian mother's home due to extreme neglect and abuse. When the county in which she lived first became involved in her life in January 2005, neither Sierra nor her brothers were enrolled in school and they were found living in a home that was deemed a health and safety hazard to children.[19] There was little or no adult supervision in the home. There was garbage everywhere and no food to eat. The children had dirty clothes and they were sleeping where ever they could find a clean spot in the home.

Sierra's biological mother was a drug addict and alcoholic, with a lengthy criminal history. Her crimes included theft, forgery, assault, malicious punishment of a child, and criminal vehicular injury. Sierra and her brothers spent their childhood in a home filled with violence, drug and alcohol abuse, and neglect. Sierra's biological mother was embroiled in a series of relationships and marriages to violent and abusive men. Sierra's biological mother even assaulted Sierra, dragging her across the lawn by her hair, leaving her screaming and bleeding.

Despite the county's repeated efforts to rehabilitate the family relationships, the county ultimately found it was unable to reunite the children with their

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[19] *In the Matter of the Welfare of the Children of . . .* , No. 04-J7-05-50043 (Beltrami County, Minn.), Permanency Order of September 11, 2006 at ¶ 5 (Holter, J.).

mother and determined that permanent removal was necessary to protect the best interests of the children.

After the children were removed from the home and placed in foster care, Sierra's biological mother repeatedly told the county to keep her children. As years went by, Sierra rarely had any contact with her mother. But when Sierra asked her mother to voluntarily terminate her parental rights so she could be adopted, her mother refused. Then, after finding the courage to approach her foster family about adoption, Sierra had to go to the Leech Lake Tribal Commission to ask the Tribe to support her adoption by a non-Indian family. Leech Lake turned down pleading requests *three times*.

Because of her status as an Indian child, Sierra faced an uphill battle under ICWA to be adopted. Adoption is generally in the best interests of a child like Sierra, who was permanently removed from the custody of her biological mother. Adoption was also psychologically critical for Sierra, who needed to know that her non-Indian foster parents would be her parents forever – and not just another home from which she would be removed. But ICWA made this difficult. Although Leech Lake did not object to Sierra remaining with her non-Indian foster-care family (who lacked any cultural connections to the tribe), Leech Lake (which did not want the precedent of having supported a non-Indian adoption) would not support the termination of Sierra's mother's parental rights.

Through her guardian ad litem, Sierra finally filed a petition to terminate her biological mother's parental rights. Because Sierra has Indian blood, she had to meet a heightened burden under ICWA, including a finding, beyond a reasonable doubt, that active efforts had been made to prevent the breakup of the family and that those efforts had failed.

Sierra also had to prove, beyond a reasonable doubt, that if she were returned to her biological mother, serious emotional or physical harm would likely result. The testimony of the likelihood of such harm had to come from a qualified expert witness, with both relevant professional expertise and relevant cultural expertise to testify to such a conclusion about an Indian child. Further, a court had to find that "good cause" existed to deviate from the preferences for tribal placement dictated by ICWA, to place Sierra in a non-Indian home.

After a hearing on the petition to terminate parental rights, at which Sierra's guardian ad litem, at considerable expense, presented the testimony of a qualified expert witness to support the petition, the court found that adoption by Roger and Loreal Lauderbaugh was in Sierra's best interest and terminated the parental rights of Sierra's mother.[20] Sierra's adoption was finalized in May 2012, four years after

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[20] *In the Matter of the Welfare of the Child of . . .* , No. 04-J7-05-50043 (Beltrami County, Minn), Order of September 8, 2011 (Melbye, J.).

she began the process and one month before her eighteenth birthday.

C. Amici Esther and Craig Adams's ICWA experience.

Esther and Craig Adams are a married couple who live in Farmington, Minnesota. On February 10, 2007, a licensed child-placement agency (North Homes) gave the Adamses physical custody of ARP, who had been born less than two weeks earlier. ARP had never lived with either of her biological parents. Her biological mother, JP – who had given up custody of an earlier child at birth – wanted ARP to be adopted by the Adamses.[21] ARP's biological father (DB), who learned of ARP's birth from a relative shortly after ARP was born, had nothing to do with ARP and he ignored a certified letter from North Homes advising him that he was ARP's putative father.

The two biological parents had been involved in an intimate relationship on and off for almost four years before ARP's birth, but JP did not even identify DB as the biological father when ARP was born and, instead, lied about the identity of the child's father.[22] DB was an enrolled member of the Bois Forte Band of

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[21] Motions and Mem. of Law, Ex. B, *In re Petition of Craig and Esther Adams to Adopt [ARP]* (Minn. Dist. Ct. Aug. 4, 2008).

[22] *Id.* at Ex. A.

Chippewa.[23] He had fathered several children before ARP, including a child with JP's sister.

In June 2007, the Adamses filed an adoption petition in Minnesota state court. In February 2008 – more than a year after ARP's birth, during which the Adamses were ARP's sole caretakers – DB registered with the Father's Adoption Registry in Minnesota.[24] One month later, in March 2008, after extensive investigation of the Adamses and the birth parents, the court-appointed guardian ad litem for ARP recommended ARP's adoption by the Adamses, finding this was in ARP's best interests.[25]

Shortly thereafter, DB filed a motion for reunification with ARP and for dismissal of the adoption petition. His motion was based in part on the fact that he had reconciled with JP (ARP's biological mother) and JP had since revoked her consent to the adoption. Because the guardian ad litem's report referenced DB's criminal history – including several allegations of sexual molestation – the Adamses made a formal request to the Bois Forte Tribal Court for DB's criminal records.

To keep these records a secret, DB withdrew his motion for reunification with ARP, claiming that he

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[23] *See* Findings of Fact, Conclusions of Law, Order for Judgment and Decree of Adoption, *In re Petition of Craig and Esther Adams to Adopt [ARP]*, (Minn. Dist. Ct. Nov. 25, 2008).

[24] Motions and Mem. of Law, *supra* note 21, at 3.

[25] *Id.*

was "unable to care for [her] at the present time based on his need to obtaining [sic] independent and suitable housing."[26] He then argued that his criminal records were no longer relevant, and the court agreed.[27] But DB still refused to waive his parental rights. Instead – invoking ICWA's racial-preference system – he asked the court to take ARP from the Adamses and put her with an Indian family.[28]

In making his removal request, DB did not dispute the guardian's conclusion that adoption of ARP by the Adamses was in ARP's best interests. Indeed, he recognized "the love [ARP] has received in the Adam's [*sic*] home and is thankful for the care they have given his daughter."[29] Still, he argued that ARP's adoptive placement violated the placement preferences of ICWA and that there was no "good cause" to deviate from those placement preferences because the biological parents had not agreed to the adoption. DB also argued there was no showing that ARP had extraordinary physical or emotional needs or that suitable Indian families for ARP were unavailable for adoptive placement after a diligent search.[30]

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[26] Motions and Mem. of Law, *supra* note 21, at 5 (Aug. 4, 2008).

[27] Letter from Judge Edward Lynch, *In re Petition of Craig and Esther Adams to Adopt [ARP]* (Minn. Dist. Ct. Aug. 11, 2008).

[28] *See* Motions and Mem. of Law, *supra* note 26, at 5.

[29] *See id.* at 6.

[30] *Id.* at 4-5.

JP and DB soon thereafter separated again, and JP again agreed to let the Adamses adopt ARP.[31] In July 2008, after much strife and negotiation, JP finally signed a contact agreement with the Adamses that let her periodically visit ARP. The agreement also provided that ARP would be educated about the history of the Boise Forte Band, including "the Band's cultural, political, religious, and other practices."[32] The agreement's terms were crafted, in part, with an Ojibwe elder's help. On December 8, 2008, DB finally acquiesced to ARP's adoption.

The Adamses experiences with ICWA exemplify the discrimination that children with Indian blood suffer under ICWA. The objective best interests of ARP were not enough, under the law, to overcome the incontrovertible evidence of JP and DB's parental unfitness. As such, ICWA's racial-preference system threatened to tear a child away from the only family who had loved and cared for her since birth.

III. ICWA's constitutional infirmities should be addressed by this Court.

The common ordeal endured by Petitioners and Amici in dealing with ICWA exemplify the chaos this law has caused for countless non-Indian families raising children with Indian blood. Petitioners thus

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[31] *See* Motions and Mem. of Law, *supra* note 26, at 5.

[32] Contact Agreement, *In re Petition* (Minn. Dist. Ct. July 22, 2008).

advance a narrower reading of ICWA that would give Petitioners relief and further avoid the need to consider ICWA's constitutionality. Pet'rs' Br. at 19-49. But Amici respectfully submits that now is the time for this Court to directly address the constitutionality of ICWA's racial-preference system for the custody of children with Indian blood.

A. Petitioners' case stems from ICWA's constitutionally infirm racial preference system for child custody.

Petitioners lost custody of their adopted baby girl – a child with Indian blood – because the lower court held that the girl's Indian biological father could invoke ICWA to halt an adoption voluntarily initiated by the girl's non-Indian biological mother. *See Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 567 (S.C. 2012). The court held that ICWA mandated this result despite: (1) the father having abandoned the girl for most of her life; and (2) the girl lacking material tribal ties, having been born to a non-Indian mother outside of any tribal context. *See id.*

Petitioners argue that the state court reached these holdings based on a misreading of ICWA that runs counter to ICWA's text, history, and purpose, as well as key constitutional rights. *See* Pet'rs' Br. at 19-49. Petitioners argue that a proper, narrower reading of ICWA would remedy this error as well as avoid the constitutional issues that are raised by the state court's interpretation of ICWA. *See id.* Under this

narrower reading: (1) state law (not ICWA) should govern when an unwed father may invoke ICWA's protections related to "parents"; and (2) ICWA should generally not apply to voluntary adoptions initiated by a sole custodial, non-Indian parent. *See id.*

This interpretation of ICWA would certainly do much to reduce the harm that ICWA inflicts on non-Indian parents seeking to adopt children with Indian blood. But these harms are not limited to just what Petitioners have endured. ICWA is harming many would-be adoptive parents and Indian children through a racial-preference system designed to regulate the custody of children with Indian blood – a system that replaces objective concern for the "best interests of the child" with a presumption that "placement of Indian children within the preferences of [ICWA] is in the best interests of Indian children." *In re S.E.G.*, 521 N.W.2d at 362. But for this racial gerrymandering, Petitioners would not have lost custody of their adopted daughter. *See Adoptive Couple*, 731 S.E.2d at 567 ("ICWA applies and confers conclusive custodial preference to the Indian parent.").

Given this reality, Amici respectfully submit that the constitutional issues that Petitioners now urge can be avoided through their narrow reading of ICWA are, in fact, "'indispensably necessary' to resolving the case at hand." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 919 (2010) (Roberts, C.J., concurring). Accordingly, the Court should not hesitate to "meet and decide" these issues. *Id.*

B. The decision of state courts to create an Existing-Indian-Family exception to ICWA further proves why ICWA needs constitutional review.

To resolve Petitioners' case, this Court should finally decide the constitutional issues that surround ICWA's racial-preference system for child custody. Avoiding these issues is no longer an option – and the distressing history of state ICWA jurisprudence over the last thirty years demonstrates why. Faced with repeated instances in which ICWA's racial-preference system for child custody threatened a child's actual "best interests," several state courts deemed it better to create a special exception to ICWA rather than review the Act's constitutionality.[33] In the long term, the flaws of this approach have led most state courts to reject it, including the same court that pioneered the exception thirty years ago.

The Existing-Indian-Family exception to ICWA was forged in 1982 by the Kansas Supreme Court in *In re Adoption of Baby Boy L.*, 643 P.2d 168, 206 (Kan. 1982). The case involved a baby boy with five-sixteenths Kiowa Indian blood. *See id.* at 209. The child was voluntarily placed for adoption by his non-Indian mother, who had no tribal ties or connections. *See id.* at 204-05. But the child's Indian

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[33] *See* Dan Lewerenz & Padraic McCoy, *The End of "Existing Indian Family" Jurisprudence:* Holyfield *at 20,* In the Matter of A.J.S., *& the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 685, 686 (2010).

father objected and sought tribal custody despite being in jail for multiple violent felonies. *See id.*

After noting all these facts, the Kansas Supreme Court held that ICWA did not apply to the child, for Congress never meant "to dictate that an illegitimate infant who has never been a member of an Indian home . . . should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother." *Id.* at 206. But the court also recognized that the child's bloodline meant that he was "an 'Indian child' within the definitions of [ICWA]." *Id.* at 208.

State courts that adopted the Existing-Indian-Family exception in the years following *Baby Boy L.* were able to spare many children from the harms of ICWA's racial-preference system while avoiding the constitutional issues involved[34] – but only for a short while. Only six states apply the exception today.[35] Nineteen other states have rejected the exception,[36] including Kansas, whose supreme court overruled *Baby Boy L.* in 2009. *See In re A.J.S.*, 204 P.3d 543 (Kan. 2009). In doing so, the court explained that it could no longer ignore "the plain language of ICWA" or "ICWA's core purpose of 'preserving and protecting the interests of Indian tribes. . . .'" *Id.* at 550. This reasoning makes clear why the constitutional issues

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[34] *See id.* at 695-96 (collecting cases).

[35] *See id.* at 687 & n.10.

[36] *See id.* at 687 & n.12.

raised by ICWA cannot be interpreted away, but instead must be tackled head on if the actual, objective "best interests" of all children with Indian blood are to be protected in the years to come.

C. ICWA's severability clause invites constitutional review of the Act.

One final reason why this Court should address the constitutional issues raised by Petitioners' case is because ICWA contains the following severability clause: "If any provision of this chapter *or the applicability thereof* is held invalid, the remaining provisions of this chapter shall not be affected thereby." 25 U.S.C. § 1963 (emphasis added).

The presence and wording of this clause thus anticipate that "a legislatively unforeseen constitutional problem" might arise with ICWA that would "require[ ] modification of a statutory provision as applied in a significant number of instances." *United States v. Booker*, 543 U.S. 220, 247 (2005). As such, this Court should favor severability over avoidance in dealing with ICWA's constitutionality. *See Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., dissenting) ("The Constitution does not . . . tolerate . . . devotion to the status quo . . . when such devotion ripens into racial discrimination.").

IV. ICWA denies equal protection to children with Indian blood in custodial matters.

"Equal protection of the laws" is one of the most fundamental "personal rights" afforded under the Constitution. *Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978). This right serves to ensure that our laws do not mean "one thing when applied to one individual and something else when applied to a person of another color." *Id.* at 289-90. Yet, unequal treatment is just what ICWA doles out: treatment that leaves children with Indian blood less protected in custodial matters than their non-Indian peers. ICWA's racial-preference system for child custody thus warrants – and cannot survive – strict scrutiny review.

A. ICWA regulates child custody based on race – not political affiliation.

"Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring). As such, this Court has recognized time and again that laws based on "blood" are among the most destructive racial classifications possible. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11-12 & n.4 (1967) (invalidating state bar on marriage between persons of certain racial blood quanta). *Contra Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (upholding a system of racial segregation in public transportation

that was triggered by the "proportion of colored blood necessary to constitute a colored person").

This Court's decisions regarding the "unique legal status of Indian tribes under federal law" do not deviate from this equal-protection principle. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Indeed, this Court has found that while Congress can enact laws that "single[ ] out Indians for particular and special treatment" without offending equal protection, this Court has also emphasized that such laws may not be directed at Indians on the basis of race *alone* – they must also rest on *voluntary political affiliation*. *See id.* at 553-55 & n.24. Hence, when a law serves to classify and regulate Indians in a way that "operates to exclude many individuals who are racially to be classified as 'Indians'. . . . the preference is political rather than racial in nature." *Id.* at 554 n.24.

Respect for this political-affiliation distinction is consistent with the only ICWA-related case that this Court has decided to date. In *Mississippi Band of Choctaw Indians v. Holyfield*, this Court held that federal law – not state law – determined the meaning of the term "domicile" under ICWA. 490 U.S. 30, 47 (1989). The Indian parents in the case were enrolled tribal members and *active tribal residents*. *See id.* at 37-38. In short, they chose to affiliate themselves – and by legal extension, their newborn children – with a specific tribe. *See id.* at 48-53. And under ICWA, this choice granted the tribe exclusive jurisdiction over child custody proceedings involving the parents' newborns. *See id.* This Court thus found that the

parents' temporary departure from tribal land could not defeat this reality. *See id.* The Court did not hold that ICWA enabled the tribe to assert authority over the parents – or their children – simply because they shared some quantity of tribal blood. *See id.*

Based on these principles, this Court should find that ICWA's racial-preference system for child custody operates entirely based on race – not political affiliation.[37] By its own terms, ICWA governs any "child custody proceeding" that involves an "Indian child." *See* 25 U.S.C. §§ 1911-1922. But ICWA's definition of an "Indian child" is not limited to children who have *voluntarily* joined a tribe, either on their own initiative or through their parents. *See id.* at § 1903(4). Instead, "Indian child" under ICWA includes *all* children who *could belong* to a tribe and who have a biological parent who is a member, thereby incorporating Indian tribal law that tends to define eligibility for tribal membership exclusively in terms of "blood." *See supra* Part I.A.

ICWA's blood-driven definition of "Indian child" thus enables Indian tribes to influence the custody of any child as long as the child has some tribal blood. *See, e.g., In re S.M.M.D.*, 272 P.3d 126, 128 (Nev. 2012) (noting that change in tribe's blood quantum

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[37] Congress has already conceded that ICWA regulates child custody based on race to the extent it has seen fit to exclude ICWA from the scope of federal laws barring racial discrimination in adoption. *See* 42 U.S.C. § 1996b(3) (2012).

criteria rendered children-at-issue subject to ICWA). The same goes for the custodial preferences and evidentiary burdens that ICWA prescribes – they all fall under the same blood-driven definitions for tribal membership that govern the meaning of "Indian child." *See* 25 U.S.C. § 1903(3) ("'Indian' means any person who is a *member* of an *Indian* tribe. . . ."); *id.* § 1915(a) (dictating that adoptive placements should favor "the *Indian child's* tribe" or "other *Indian* families"). And therein lies ICWA's basic character as an ever-expanding system of racial classification, versus being a more humble set of political preferences that actually "exclude[ ] many individuals who are racially . . . classified as 'Indians'." *Morton*, 417 U.S. at 554-55 n.24.

B. ICWA greatly burdens children with Indian blood in custodial matters.

It is repugnant to the principle of equal protection that any person "may be compelled to hold . . . any material right essential to the enjoyment of life, at the mere will of another." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). But that is what ICWA forces children with Indian blood to experience on a regular basis: because of ICWA's racial-preference system for child custody, children with Indian blood must hold their right to a stable home at the mere will of Indian tribes and, sometimes, unfit Indian parents.

Accordingly, while ICWA is often understood as a law that confers a series of *benefits* on children with

Indian blood, the reality is the exact opposite: children with Indian blood are *greatly burdened* in custodial matters thanks to ICWA and the manner in which its racial preferences serve to put "the best interests of the tribe" ahead of "the best interests of the child." And these burdens, of course, are ones that non-Indian children do not have to face.

These burdens include:

Empowered Unfit Parents – ICWA bars children with Indian blood from obtaining permanent residence in a home with loving adoptive parents until the state has made "active efforts . . . to provide remedial services . . . designed to prevent the breakup of the Indian family." 25 U.S.C. § 1912(d). ICWA's "active efforts" rule thus often forces children with Indian blood to stay with an objectively unfit Indian parent for a long time, as the state tries to fix a family that may not have even existed in the first place. *See, e.g.*, *People ex rel. K.D.* 155 P.3d 634, 637 (Colo. App. 2007) ("[T]he court may terminate parental rights . . . when a social services department has expended substantial . . . efforts *over several years* to prevent the breakup of the family. . . ." (emphasis added)).

Worse yet, states must meet – and children with Indian blood must live with – ICWA's "active efforts" rule even if the Indian parent invoking the rule has previously abused children or is incarcerated. *See, e.g.*, *A.M. v. State*, 891 P.2d 815, 827 (Alaska 1995) (vacating termination of Indian father's rights under

ICWA on "active efforts" grounds even though father was incarcerated for sex abuse). By contrast, non-Indian children governed under the federal Adoption and Safe Families Act (ASFA) do not face this burden. *See People ex rel. J.S.B.*, 691 N.W.2d 611, 613, 617 (S.D. 2005) (explaining that ASFA, unlike ICWA, does not require "active efforts" if parent "has a pattern of abusive or neglectful behavior").

Greater Custodial Instability – ICWA lets Indian parents and tribes intervene in custodial proceedings involving children with Indian blood at almost any time. *See* 25 U.S.C. § 1911(c). ICWA also lets Indian parents withdraw previous consent to an adoption "*for any reason at any time*" before the adoption is finalized. *Id.* § 1913(c). Hence, children with Indian blood are faced with the chronic possibility that years of their lives in loving non-Indian adoptive homes can be threatened (or wiped out) in an instant based on mere tribal or parental caprice. Petitioner's case amply reflects this disturbing reality, as do Amici's own experiences with ICWA. *See supra* Part II.

Lost Chances for Adoption – ICWA imposes high evidentiary burdens on non-Indian parents who wish to adopt a child with Indian blood. *See* 25 U.S.C. § 1912(e), (f). ICWA further institutes affirmative custodial preferences in favor of Indian custodians. These provisions thus inherently diminish the pool of parents available to children with Indian blood in need of foster or adoptive care. Indeed, "[f]or non-Indians who wish to adopt an Indian child, the risks are often considerably greater than in adoptions of

other children."[38] And Petitioners' case reflects these "greater risks" in spades. *See supra* Part III.A

C. ICWA's racial-preference system for child custody fails strict scrutiny for lack of narrow tailoring.

"[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny." *Adarand Constructors*, 515 U.S. at 227. This is particularly true when the racial classification at issue is a form of preference or entitlement. After all, "[t]o pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred." *Id.* at 239 (Scalia, J., concurring).

"Under strict scrutiny, the government has the burden of proving that racial classifications 'are narrowly tailored measures that further compelling governmental interests.'" *Johnson v. California*, 543 U.S. 499, 505 (2005). And if the "compelling interest" at stake is correcting "past racial discrimination," then "narrowly tailored" means the government: (1) avoided defining the remedy in overinclusive terms; and (2) "carefully examined and rejected race-neutral

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[38] Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. OF DETROIT L. REV. 451, 453 (1989).

alternatives." *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 507-08 (1989).

As explained in Part IV.A, ICWA regulates child custody based on race. ICWA's racial classifications are thus subject to strict scrutiny. Now, a "compelling interest" for these classifications may be found in Congress's desire to help Indian tribes in the late 1970s, when state agencies were taking many Indian children from their tribal families and placing them with non-Indian homes for improper, racially-biased reasons. *See* 25 U.S.C. §§ 1901-1902.

But Congress drafted ICWA in such a grossly overinclusive manner that it encompassed not only voluntary members of Indian tribes but also any child who could be classified as "Indian" via the operation of tribal blood-driven membership requirements. *See id.* § 1903(3), (4). This reality in itself demonstrates that Congress did not narrowly tailor ICWA to deal with the problem of clearly wrongful removals of Indian children from otherwise proper Indian homes. *Cf. City of Richmond*, 488 U.S. at 506.

There also is no evidence that Congress either considered or tried any race-neutral alternatives for stopping wrongful removals before it passed ICWA. For example, Congress could have funded training programs for state court judges, guardians ad litem, and attorneys who regularly dealt with Indian children, helping them to better understand how to factor tribal culture and history of Indian family life into an

objective evaluation of a child's actual best interests. *Cf. City of Richmond*, 488 U.S. at 507.

Ample reason thus exists for this Court to find that ICWA's tribal, blood-driven racial classifications lack narrow tailoring and thus are unconstitutional as a matter of strict scrutiny review.

V. In custodial matters, ICWA denies due process to children with Indian blood.

Children have rights under the Constitution. *See Troxel v. Granville*, 530 U.S. 57, 89 n.8 (2000) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."). One of these rights is the child's fundamental due-process right to have their long-term custodial status be adjudicated based on an objective review of their own "best interests." Two cases decided by this Court involving custodial determinations reflect this basic principle.

In *Lehr v. Robertson*, this Court held that a father's status as biological parent did not outweigh the right of his child to stay in a loving and stable adoptive home. 463 U.S. 248, 261-65 (1983). In reaching this conclusion, the Court repeatedly pointed to the "best interests" – standard as the key test by which a child's custodial status is to be decided. *See id.* at 254, 257, 259, 262, 266-67. Ultimately, concern for protecting the integrity of this standard compelled the Court to find that where a biological father deliberately failed to develop any real relationship with

his child, "the Federal Constitution will not automatically compel a State to listen to *his opinion of where the child's best interests* lie." *Id.* at 262 (emphasis added).

Similarly, *Quilloin v. Walcott*, this Court held that a child's "best interests" was the only standard a state court needed to consider in deciding whether an unwed absentee father could stop his biological child from being adopted. 434 U.S. 246, 248-255 (1978). As the Court noted: "[W]e cannot say that the State was required in this situation to find *anything more* than that the adoption, and denial of legitimation, were in the 'best interests of the child.'" *Id.* (emphasis added).

Lehr and *Quilloin* (and cases similar to them) thus evince the fundamental due-process right of children to have their long-term custodial status be adjudicated by reference to an objective evaluation of their "best interests."[39] But, as several state courts have implicitly held, ICWA displaces this right with legislative concern for what best serves Indian tribal interests. *See, e.g.*, *In re S.E.G.*, 521 N.W.2d at 362; *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah

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[39] The Court's analysis of "best interests" review in *Reno v. Flores* does not affect this conclusion. 507 U.S. 292, 303-04 (1993). In *Reno*, the Court held that "best interests" was not the sole test for how the government – or natural parents – should be judged as custodians when providing otherwise adequate care. *See id.* But the Court did not displace the standard as the most proper basis for *determining who a child's guardian should be* when this is legitimately in doubt. *See id.*

1986) ("[T]he tribe's ability to assert its interest in its children . . . is at the core of the ICWA . . . .").

In this regard, ICWA is best understood as a sweeping, almost irrebuttable statutory presumption in favor of tribal custody. *See* 25 U.S.C. §§ 1902, 1911, 1915. This presumption works to displace objective evaluation of an Indian child's actual "best interests" with the more parochial ambition of: (1) ensuring tribal courts decide the future of children with Indian blood; and (2) ensuring children with Indian blood are placed in tribal homes to advance their racial identity and tribal status. *See id.*; *In re Baby Girl Doe*, 865 P.2d 1090, 1095 (Mont. 1993) ("[T]he principal purposes of [ICWA] are to promote the stability and security of Indian tribes . . . .").

But as this Court observed in *Vlandis v. Kline*, "permanent irrebuttable presumptions have long been disfavored" as a matter of due process. 412 U.S. 441, 446 (1973). Hence, in *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court determined that "an Illinois statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the Due Process Clause." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 645 (1974). The Court reached this vital conclusion because it recognized "the State could not conclusively presume that any particular unmarried father was unfit to raise his child; the Due Process Clause required a more individualized determination." *Id.*

Similar reasoning reveals the gross extent to which ICWA violates the due-process rights of children with Indian blood: ICWA conclusively presumes in all cases involving such children that "placement . . . within the [tribal] preferences of [ICWA] is in the best interests of Indian children." *In re Custody of S.E.G.*, 521 N.W.2d at 362. But standard best-interests review makes no such presumption and instead requires individualized determinations. *Cf. Stanley*, 405 U.S. at 654 n.5, 658 (holding that unwed father could not be presumed unfit under state law that otherwise applied "best interests" test).

This Court should find ICWA violates the fundamental due-process right of children with Indian blood to have their custody determined just like that of any other child: based on what is in their own best interests, rather than based on a nearly irrebuttable, racially-driven statutory presumption. Moreover, as explained in Part IV.C of this brief, this Court should find that such a presumption cannot be justified under the test of strict scrutiny.

CONCLUSION

In *Holyfield*, this Court observed that ICWA protects "the rights of the Indian child *as an Indian*." 490 U.S. at 37. Consistent with this view, the lower court took non-Indian Petitioners' adopted Indian daughter from them – destroying the only family she has ever known. Given this reality and Amici's own

experiences, Amici respectfully submit that even if ICWA protects the rights of the Indian child "as an Indian," the Constitution requires this Court protect the rights of the Indian child *as a child*.

This Court should therefore reverse the decision below on the grounds that ICWA's racial-preference system for child custody is unconstitutional.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF PROFESSOR JOAN HEIFETZ HOLLINGER, PROFESSOR ELIZABETH BARTHOLET, CENTER FOR ADOPTION POLICY, AND ADVOKIDS AS AMICI CURIAE IN SUPPORT OF RESPONDENT BABY GIRL AND REVERSAL

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INTEREST OF AMICI CURIAE

Amici are two law professors and two non-profit organizations with substantial knowledge of, and experience dealing with, the adoption and child custody issues presented in this case.[1]

Professor Joan Heifetz Hollinger, the John and Elizabeth Boalt Lecturer-in-Residence at the University of California Berkeley Law School, is a leading American scholar on adoption law and policy. She has been devoted to research, teaching, and advocacy on family law issues, especially as they affect the welfare of children. She is the editor and principal author of the standard national treatise *Adoption Law and Practice* 3 vols. (Lexis\Matthew Bender Co. 1988, Supp. 2012), co-editor of *Families By Law: An Adoption Reader* (NYU Press, 2004), and the author of numerous articles and conference papers, including *Interstate Jurisdiction and Choice of Law Issues in Adoption and Other Parentage Proceedings* (PLI 2010). She is the Reporter for the proposed Uniform Adoption Act, helped draft the revised Uniform Parentage Act of 2002, is an Honorary Member of many child advocacy organizations, wrote the federal *Guide to the*

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the *amici* or their counsel made such a monetary contribution. All parties have consented to the filing of this brief through letters of consent on file with the Clerk of this Court.

Multiethnic Placement Act (1998), and is at the forefront of efforts to improve the Hague Convention on Intercountry Adoption. She has appeared as *amicus curiae* on behalf of children in a number of high-profile adoption, assisted reproduction, parentage, and custody cases in state and federal courts that have recognized children's legal ties to their actual parents, whether biological or non-biological.

Professor Elizabeth Bartholet is the Morris Wasserstein Public Interest Professor of Law at Harvard Law School, and Faculty Director of its Child Advocacy Program, which is committed to advancing children's interests through facilitating productive interaction between academia and the world of policy and practice, and through training generations of students to contribute in their future careers to law reform and social change. She teaches civil rights and family law, specializing in child welfare and adoption. Before joining the Harvard Faculty, she was engaged in civil rights and public interest work, first with the NAACP Legal Defense Fund, and later as founder and director of the Legal Action Center, a non-profit organization in New York City focused on criminal justice and substance abuse issues. Bartholet graduated from Radcliffe College and from Harvard Law School. She has won several awards for her writing and her related advocacy work in the area of adoption and child welfare.

The Center for Adoption Policy (CAP) is a New York based non-profit organization. Its mission is to provide research, analysis, advice, and education to practitioners and the public about current legislation

and practices governing ethical domestic and intercountry adoption in the United States, Europe, Asia, Latin America, and Africa. CAP is an independent entity. It is not affiliated with any agency or entity involved in the placement of children.

Advokids is a non-profit organization that advocates on behalf of children in the foster care system and is dedicated to promoting, protecting, and securing for every California foster child the legal rights to which they are entitled, including each child's right to safety, security, and a permanent home. While Advokids serves all California foster children, it has a special focus on infants and young children in the foster care system and the effects of insecure placements on their long-term emotional health and well-being because more than 35% of the children entering foster care are under the age of five and remain in the foster care system longer than older children. Advokids' programs include policy advocacy with respect to issues affecting children in foster care. To that end, Advokids has participated as *amicus curiae* in both state and federal court proceedings affecting the rights of children in the foster care system.

Because the Supreme Court of South Carolina's interpretation of ICWA directly affects the rights of children as well as biological and adoptive parents, *amici* have a significant interest in the questions presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963, to limit the circumstances in which Indian children can be removed from their families involuntarily. *See Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–37 (1989). Congress determined that, because of their insensitivity to tribal culture, state and local welfare agencies were removing children from Indian families at "an alarmingly high" rate. 25 U.S.C. § 1901(4)–(5). To address this problem, Congress enacted ICWA "to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families." *Id.* § 1902.

ICWA protects the stability of Indian families by, among other things, providing procedural and substantive rights to an Indian child's parent or parents. In addition to affording parents notice, appointment of counsel, and a right of access to reports or documents, ICWA prohibits the termination of parental rights absent a showing, "beyond a reasonable doubt," that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." *Id.* § 1912(f). These rights may be invoked only by a "parent," which Congress defined to include "any biological parent," while expressly excluding "the unwed father where paternity has not been acknowledged or established." *Id.* § 1903(9).

In interpreting this definition, the Supreme Court of South Carolina concluded that Congress defined "parent" broadly to include unwed fathers who have no parental rights under state law. As the court acknowledged, Birth Father could not object to Adoptive Couple's adoption of Baby Girl under South Carolina law because he had abandoned her and her mother. But, in the court's view, this state law was irrelevant to determining whether Birth Father was a "parent" under ICWA. Because he had intervened in the adoption proceeding and a DNA test showed that he was the biological father, Birth Father was a "parent" under ICWA and could block the adoption and take custody of the child he had never met.

The state court's interpretation of ICWA is deeply flawed. Congress intended for ICWA to protect Indian families by limiting the circumstances in which they could be broken up. Congress did not intend for ICWA to allow an unwed Indian father with no parental rights under state law to block a non-Indian mother's voluntary adoptive placement of her newborn child, which would lead to the dissolution of the family Baby Girl has known since birth.

I. ICWA's definition of "parent" must be interpreted in light of the backdrop against which the statute was enacted. At the time, this Court's decisions made clear that *some* unwed fathers had constitutionally protected parental rights, but they did not hold that *all* unwed fathers had such rights. *See Stanley v. Illinois*, 405 U.S. 645 (1972). Subsequent decisions held that a father's biological connection to a child, standing alone, does not entitle him to notice of a child custody proceeding involving

his biological child, much less a right to veto an adoption arranged by the child's mother. *See Lehr v. Robertson*, 463 U.S. 248, 261 (1983). The vast majority of states responded to these decisions by enacting laws that drew the same distinction and extended substantive parental rights only to unwed fathers who had demonstrated an actual commitment to parenting and a capacity to assume custody of their child, not merely a desire to block the mother's placement decisions.

This Court should interpret ICWA's definition of "parent" to incorporate these state laws. By defining "parent" to include "any biological parent," the first sentence of the "parent" definition requires a biological connection between the father and child. Thus, Congress had no reason to add the "unwed father" exclusion if it wanted an unwed father to become a "parent" based solely on biology. Rather than depriving the "unwed father" exclusion of any independent meaning, the Court should interpret it to incorporate the state law limitations on the rights of unwed fathers, especially given the well-established presumption that Congress intends to incorporate state parentage laws. *See, e.g., De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956).

ICWA's incorporation of state law is confirmed by the statute's history and purpose. The legislative history indicates that the "unwed father" exception was intended to take into account this Court's decision in *Stanley*, which spurred the development of state laws addressing the parental rights of unwed fathers. By expressly referencing *Stanley*, Congress displayed its intent to preserve state laws governing the rights of unwed fathers. This interpretation of

ICWA is also consistent with Congress's goal of protecting Indian families, children, and tribes. Nothing in ICWA's congressional findings nor its declaration of policy suggests that Congress intended to displace the state law limitations on the rights of unwed Indian fathers.

II. Even if ICWA could be read to preempt state law limitations on the rights of unwed fathers, the Court should not adopt this interpretation in light of the serious constitutional concerns it would raise.

Under the state court's interpretation, unwed Indian fathers have greater parental rights than unwed non-Indian fathers based solely on their Indian ancestry. Although Congress can provide preferential treatment to promote Indian tribal self-governance, the racial classification does nothing to further this interest here. Regardless of whether Birth Mother chose to raise the child herself or to consent to Adoptive Couple's adoption, Baby Girl was going to be raised by a non-Indian parent (or parents) away from the Indian reservation. As a result, if the Court were to interpret ICWA to give preferential treatment to unwed Indian fathers in these circumstances, the law should be subject to strict scrutiny, which it almost certainly could not satisfy.

The state court's interpretation of ICWA also raises serious due process concerns. An unwed mother with sole custody of her children unquestionably has a due process right to make decisions concerning her children. When the biological father does not have the same right, a law that allows him to interfere with the mother's

exercise of her rights raises serious due process concerns. The state court's interpretation also forces this Court to decide whether children have a fundamental liberty interest in preserving their relationships with adoptive parents. The Court should avoid these constitutional issues by interpreting ICWA's definition of parent to incorporate state law.

III. Most states distinguish between the parental rights of unwed fathers who demonstrate a commitment to raising their children and those who do not. Indeed, more than 30 states consider the same factors as South Carolina in determining whether to require an unwed father to consent to an adoption. As a result, adopting the South Carolina court's interpretation of "parent" would affect adoptions of Indian children across the country by preempting parentage laws in these states. This result would disrupt states' careful policy judgments regarding the rights of unwed fathers, biological mothers, children born out of wedlock, and adoptive parents, in an area where states have traditionally been free to legislate.

ARGUMENT

I. ICWA's Definition of "Parent" Incorporates State Law Limitations on the Rights of Unwed Fathers.

The state court held that Birth Father was a "parent" under ICWA because he had intervened in the adoption proceeding and had established, through DNA testing, that he was Baby Girl's biological father. App. 22a. By interpreting "parent"

in this manner, the court construed ICWA to preempt the South Carolina law that would have allowed Birth Father to veto the adoption only if he could show that he lived with Baby Girl or provided financial support during Birth Mother's pregnancy. *See* S.C. Code Ann. § 63-9-310(A)(5). Rather than construing "parent" to preempt this state law, the court should have followed the approach of the many state courts that interpret the term to incorporate state law.[2] Had the court taken this approach, Birth Father could not object to Baby Girl's adoption under ICWA because he could not do so under state law.

A. When Congress Enacted ICWA, State Laws Provided Parental Rights to Unwed Fathers Only If They Assumed Parental Responsibilities.

Until the early 1970s, many states followed the common law rules in which biology played no role in whether a father had parental rights. If a mother were married when she gave birth, the common law provided parental rights to both the mother and her husband, who was presumed to be the child's father. *See Michael H. v. Gerald D.*, 491 U.S. 110, 124–25 (1989) (plurality). When a child was born out of wedlock, the mother was considered the child's only

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[2] *See, e.g., In re Daniel M.*, 1 Cal. Rptr. 3d 897, 900 (Ct. App. 2003); *In re S.A.M.*, 703 S.W.2d 603, 607 & n.4 (Mo. Ct. App. 1986); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 933–38 (N.J. 1988); *In re Adoption of Baby Boy D*, 742 P.2d 1059, 1064 (Okla. 1985), *overruled on other grounds In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *Yavapai-Apache Tribe v. Mejia*, 906 S.W.2d 152, 173 (Tex. App. Ct. 1995).

parent, and the biological father had no parental rights. See Joan Heifetz Hollinger, 1-2 *Adoption Law & Practice* § 2.04[2][a] (Lexis\Matthew Bender Co. 1988, Supp. 2012).

After this Court's decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), states could no longer follow the common law rules and deprive all unwed fathers of parental rights. In *Stanley*, the Court held that an unwed father has a due process right to notice of a child custody proceeding involving his biological child if he has developed a substantial relationship with the child. *Id.* at 648. There, the father had lived with, and helped raise, his biological children, but had never married their mother. *Id.* at 646. When the mother died, the state declared the children to be wards of the state without giving the father an opportunity to show that he was fit to continue caring for them. *Id.* Noting that an unwed father has a constitutionally protected interested in the "children he has sired and raised," *id.* at 651, the Court concluded that the state's irrebuttable presumption that an unwed father is unfit to care for his children violated the father's due process and equal protection rights, *id.* at 657–58.

Five years after *Stanley*, and less than a year before ICWA was enacted, the Court revisited the issue of unwed fathers' constitutional rights. *See Quilloin v. Walcott*, 434 U.S. 246 (1978). In *Quilloin*, the Court upheld a state law that required an unwed mother, but not an unwed father, to consent to an adoption. *Id.* at 256. The unwed father in *Quilloin* had never lived with his biological child, "had provided support only on an irregular basis," and

asserted his parental rights only after receiving notice of the adoption proceeding. *Id.* at 250–51. Because the father "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child," the Equal Protection Clause did not require the state to provide the father with the same consent rights as it provided to the mother. *Id.* at 256.

This Court's subsequent decisions also distinguish between the constitutionally protected parental rights of unwed fathers who demonstrate a commitment to raising their children and those who do not. Shortly after ICWA's enactment, the Court held that an unwed father's equal protection rights were violated by a state law requiring only the unwed mother to consent to an adoption. *See Caban v. Mohammed*, 441 U.S. 380 (1979). Because the biological father in *Caban* had lived with his children and had "participated in [their] care and support," the father's "relationship with his children [was] fully comparable to that of the mother," and therefore he was entitled to the same parental rights. *Id.* at 389.

Finally, in *Lehr v. Robertson*, 463 U.S. 248, 260 (1983), the Court explained that the Due Process Clause requires an unwed father to receive notice and an opportunity to be heard only when he has a cognizable liberty interest at stake in the proceeding. Such an interest is present "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child." *Id.* at 261 (internal quotation marks, brackets, and citation

omitted). In contrast, "the mere existence of a biological link does not merit equivalent constitutional protection." *Id.* Because the unwed father in *Lehr* "never had any significant custodial, personal, or financial relationship" with his daughter, he did not even have a due process right to notice of her adoption, much less any right to block the adoption. *Id.* at 262.

As a result of *Stanley*, states could not deprive all unwed fathers of parental custodial rights when ICWA was enacted. Although there was some uncertainty about what the Constitution required in the context of adoption proceedings, the states did not respond to *Stanley* by granting parental rights to all unwed fathers based solely on their biological connection to a child. Nor did states go so far as to ensure that all unwed fathers had notice of adoption or custody proceedings involving their biological children. Instead, they enacted laws that identified the circumstances in which notice was required, and instructed unwed fathers of the steps they must take to ensure they would receive notice.

In 1973, one year after *Stanley*, the Uniform Law Commissioners promulgated the Uniform Parentage Act (UPA), which provided comprehensive treatment of legal parenthood by specifying the circumstances in which an unwed father could be recognized as a child's parent under the law. Under the UPA, unwed biological fathers were not automatically recognized as legal parents. Instead, a male was "presumed to be the natural father" where certain conditions were met. UPA § 4(a). An unwed father who had never married the mother was

entitled to a presumption of paternity if he "receive[d] the child into his home and openly [held] out the child as his natural child," or he "acknowledge[d] his paternity of the child in writing" and filed it with the appropriate state agency. *Id.* § 4(a)(4)–(5). Eight states had adopted the UPA when ICWA was enacted.[3]

In addition to enacting laws addressing the issue of notice, the vast majority of states had laws that provided substantive parental rights to certain unwed fathers when ICWA was enacted.[4] These laws typically followed the distinction drawn in *Stanley* and subsequent cases, and provided parental rights only to unwed fathers who had demonstrated their commitment to parenting. Indeed, at the time of ICWA's enactment, more than half of the states did not require unwed fathers to consent to the adoption of a child unless they had "asserted or established their parental role."[5]

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[3] *See* Note, *Unwed Fathers: An Analytical Survey of Their Parental Rights and Obligations*, 1979 Wash. U. L.Q. 1029, 1055.

[4] In 1979, a few states still denied parental rights for all unwed fathers notwithstanding this Court's decision in *Stanley*. *See* Note, *Unwed Father*, 1979 Wash. U. L.Q. at 1038, 1040.

[5] Note, *Unwed Fathers*, 1979 Wash. U. L.Q. at 1047, 1059–62; *see, e.g.*, *S.C. Dep't of Soc. Serv. v. Parker*, 268 S.E.2d 282, 284 (S.C. 1980) ("[W]here the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." (internal quotation marks and citation omitted)); *Adoption of Murray*, 150 Cal. Rptr. 58, 59 & n.2 (Ct. App. 1978) (an unwed father cannot veto an adoption under California law if he "fail[ed] to communicate with [a]nd to pay for the care, support, and (continued...)

B. Congress Intended to Incorporate, Rather Than Preempt, State Law.

ICWA defines "parent" in two sentences. The first sentence states that "parent" includes "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom." 25 U.S.C. § 1903(9). The second sentence excludes from this definition "the unwed father where paternity has not been acknowledged or established." *Id.* Purporting to interpret the statute "by its plain terms," the South Carolina court concluded that Birth Father "met the ICWA's definition of 'parent' by both acknowledging his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed for adoption and establishing his paternity through DNA testing." App. 22a.

The state court's interpretation fails because it does not account for the state law limitations on the rights of unwed fathers. Given these state laws, as well as this Court's decisions addressing the constitutional rights of unwed fathers, ICWA cannot plausibly be interpreted to treat an unwed father as a "parent" based solely on his biological connection to a child. By defining "parent" to include "any biological parent," the definition's first sentence requires an unwed father to show a biological connection with the child. Thus, had Congress

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education of such child when able to do so" for the period of one year (quotation marks and citation omitted)).

intended for an unwed father to become a "parent" under ICWA based solely on biology, the first sentence of the definition would have been sufficient to achieve that result. The definition's second sentence—the "unwed father" exclusion—must therefore be interpreted to require an unwed father to show more than a biological connection to avoid violating the "cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks and citation omitted). The Court should give effect to the "unwed father" exclusion by interpreting "parent" to incorporate the state law limitations on the rights of unwed fathers.

The state court's interpretation also fails because it construes ICWA to preempt state law even though there is no indication that Congress intended this result. As the Court explained more than a century ago, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593–94 (1890). Because of the states' authority over domestic relations, this Court interprets federal law to preempt state law only where "Congress has positively required by direct enactment that state law be pre-empted," and where state family law does "major damage to clear and substantial federal interests." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (internal quotation marks and citations omitted).

Given the states' substantial interest in family law matters, this Court has presumed that Congress intended to incorporate state family law, even when preemption is not an issue. For example, in *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956), the Court interpreted the term "children" in the Copyright Act to incorporate state law. The Court explained:

> The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.

Id. (internal citations omitted); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991).

In interpreting "parent," the state court recognized that "ICWA does not explicitly set forth a procedure for an unwed father to acknowledge or establish paternity." App. 21a. That recognition should have resolved the court's inquiry. By not creating a uniform federal definition of "parent," Congress did not clearly manifest an intent to preempt the state law limitations on the parental rights of unwed fathers. The term "parent" should therefore be interpreted to incorporate state law.[6]

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[6] This Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), does not dictate a different (continued...)

2. The state court rejected the argument that ICWA incorporates state laws addressing whether an unwed father's consent is necessary for a voluntary adoption on the ground that it "collapse[s] the notions of paternity and consent." App. 22a. That is incorrect.

The court erred in attempting to differentiate between laws that solely address paternity and those that address substantive parental rights. This Court's decision in *De Sylva* makes clear that, when Congress incorporates state law, it incorporates the state laws that resolve the legal issue that the federal statute addresses. 351 U.S. at 581–82. Having interpreted "children" in the Copyright Act to incorporate state law in *De Sylva*, the Court needed to decide which of the various state laws addressing "children" had been incorporated. *Id.* Adopting a functional approach that considered the object of the federal statute, the Court held that, because "[t]his is really a question of the descent of property . . . the controlling question under state law should be whether the child would be an heir of the author." *Id.* at 582.

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result. In *Holyfield*, the Court was not addressing a substantive issue of family law, but instead was interpreting the term "domicile" to resolve a jurisdictional issue. *Id.* at 44–47. Given that the purpose of this provision was to deprive state courts of jurisdiction in certain cases, the Court concluded that "it is most improbable that Congress would have intended to leave the scope of the statute's key jurisdictional provision subject to state courts as a matter of state law." *Id.* at 45. In contrast, this case presents an issue that goes to the heart of family law: when does an unwed biological father have sufficient parental rights that he can block a child's adoption?

This functional approach is necessary to achieve Congress's objective in incorporating state law into a federal statute. The purpose of incorporation is to harmonize state and federal law so that both laws resolve the same issue in the same manner. That purpose is frustrated by the distinction that the state court attempted to draw in this case. If ICWA is interpreted to incorporate only the state laws addressing paternity, then it would still preempt the state laws addressing substantive parental rights, such as the right of an unwed father to object to an adoption. Under this flawed approach, ICWA's definition of "parent" would both incorporate and preempt state law—a result that has no support in either the case law or logic.

In this case, the "controlling question" is whether Birth Father's consent is necessary for Adoptive Couple's adoption of Baby Girl. Because ICWA's definition of "parent" incorporates state law, *see supra* Part I.A, the statute necessarily incorporates the state laws that determine whether Birth Father's consent is necessary. As the state court acknowledged, South Carolina law did not require his consent. App. 21a n.19. The state court therefore erred in interpreting ICWA to allow Birth Father to block the adoption and take custody of Baby Girl.

C. ICWA's History and Purpose Confirm Congress's Intent to Incorporate the State Law.

This Court should hold that Congress intended to incorporate state law because nothing in the statutory text rebuts the presumption against

preemption. Even if the Court were to look beyond the statutory text to determine whether Congress has clearly manifested its intent to preempt statute law, ICWA's legislative history and purpose provide further support that ICWA's definition of "parent" incorporates state law.

1. The legislative history demonstrates that Congress did not intend to displace state law limitations on the rights of unwed fathers. Instead, Congress added the "unwed father" exception to the definition of "parent" to take into account this Court's decision in *Stanley*. *See* H.R. REP. 95-1386, at 21 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7543 ("Paragraph (9) defines 'parent'. It should be noted that the last sentence is not meant to conflict with the decision of the Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972)."). In so doing, Congress expressly disclaimed any intent to preempt state law. *Id.* at 17, *reprinted in* 1978 U.S.C.C.A.N. at 7540 (ICWA not intended to "oust the State from the exercise of its legitimate policy powers in regulating domestic relations").

The reference to *Stanley* in the legislative history shows that Congress intended to leave the issue of an unwed father's parental rights to state law. *Stanley* was a critical decision in the development and proliferation of state family laws concerning unwed fathers. *See supra* Part I.A. In that case, this Court held that an unwed father had a constitutionally protected interested in the "children he has sired and raised," 405 U.S. at 651, and thus his due process and equal protection rights were violated by the state's irrebuttable presumption

that an unwed father is unfit to care for his children, *id.* at 657–58.

By endorsing the rule set forth in *Stanley*, Congress made clear that the statutory language excluding unwed Indian fathers from the definition of "parent" could not be used to shut unwed Indian fathers out of child custody proceedings altogether. Instead, by including an exception for those unwed fathers who had "acknowledged" and "established" paternity, Congress ensured that unwed fathers could exercise rights provided by state law in accordance with *Stanley*. Although Congress certainly could have overridden these state laws in favor of a uniform federal standard, the reference to *Stanley* in the legislative history demonstrates that it did not.

2. The state court's interpretation of "parent" also finds no support in Congress's purpose for enacting ICWA. Congress enacted ICWA to address the "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes." *Holyfield*, 490 U.S. at 32. This problem was the result, in Congress's view, of child welfare agencies and state courts giving insufficient weight to the importance of keeping Indian children with their parents. *Id.* at 34–35. Congress addressed this problem by requiring state courts to apply a presumption that an Indian child's interests are best served by being raised in an Indian family. 25 U.S.C. § 1912(f).

Nothing in the congressional findings nor declaration of policy suggests that Congress also

intended to provide parental rights to unwed Indian fathers who lacked rights under state law. There is no evidence that Congress thought unwed Indians fathers were being harmed by generally applicable state law limitations on the rights of unwed fathers, much less that ICWA was intended to address this concern. Given that state laws must necessarily protect the rights of unwed fathers who "demonstrate[] a full commitment to the responsibilities of parenthood," *Lehr*, 463 U.S. at 261, Congress's purpose of maintaining existing Indian families is fully served by interpreting "parent" to incorporate state law.

The state court's broad interpretation of "parent" also frustrates the purpose of ensuring that that the child's placement is in his or her best interest. Custody decisions under state law generally focus on the best interest of the child. *See, e.g., Cook v. Cobb*, 245 S.E.2d 612, 614 (S.C. 1978) ("The welfare of the child and what is in his/her best interest is the primary, paramount and controlling consideration."). *See generally* Hollinger, 1-1 *Adoption Law and Practice* §§ 1.01[2][b], 1.03[2]. In enacting ICWA, Congress adopted a strong presumption that remaining in an existing Indian family is in the best interest of an Indian child, so long as the child's safety is not a concern. 25 U.S.C. § 1912(f). But that presumption is based on the desire to keep an Indian family together. The same interest is not present when an unwed Indian father attempts to use ICWA to break up an existing family by removing his biological child from the only home she has known. No congressional policy is furthered

by sweeping aside the traditional best interest of the child inquiry in these circumstances.

In short, because interpreting "parent" to preempt state law finds no support in the legislative history and would not further Congress's objectives, that interpretation should be rejected. *See Hisquierdo*, 439 U.S. at 581.

II. ICWA's Definition of "Parent" Should Be Interpreted to Incorporate State Law to Avoid Serious Constitutional Problems.

If Congress had defined "parent" to preempt state law and provide parental rights to unwed fathers based on biology, ICWA would raise equal protection and due process concerns. The Court should "avoid such problems" by interpreting "parent" to incorporate state law. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

1. Birth Father's right to block the adoption and take custody of Baby Girl was based solely on his Indian ancestry. As the Supreme Court of South Carolina acknowledged, if Birth Father were subject to the same South Carolina laws as unwed fathers of other races, the adoption would have proceeded without his consent. App. 21a–22a & n.19. By granting preferential treatment to Birth Father based solely on race, the Supreme Court of South Carolina's interpretation of ICWA raises serious equal protection concerns.

Congress's authority to legislate on Indian affairs does not give it unfettered discretion to grant

preferential treatment to Indian tribes or their members. Although this Court "has upheld legislation that singles out Indians for particular and special treatment," such legislation is constitutionally suspect unless "the preference is reasonable and rationally designed to further Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974); *see also Rice v. Cayetano*, 528 U.S. 495 (2000); *Williams v. Babbitt*, 115 F.3d 657, 664–65 (9th Cir. 1997). The state court's interpretation of ICWA does not qualify for this exception. The decision to give Baby Girl up for adoption affected who would raise the child, but it had no effect on the fact that she would be raised by a non-Indian parent (or parents) away from the Indian reservation. As a result, the adoption neither affects the tribe's membership nor otherwise has any impact on its self-governance.

Because the state court's broad interpretation does not further Indian self-government, it should be subject to strict scrutiny. *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (recognizing a strong presumption that custody determinations based on race are unconstitutional); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating statute withholding marriage right based on race). Because there is no reason to think that ICWA could survive strict scrutiny, ICWA's definition of "parent," as interpreted by the state court, almost certainly violates the Equal Protection clause. *Cf. Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free

people whose institutions are founded upon the doctrine of equality.").

2. Interpreting ICWA to preempt state law limitations on the rights of unwed fathers also raises serious questions about the due process rights of unwed mothers. An unwed mother with sole custody of her children unquestionably has a due process right "to make decisions concerning the care, custody, and control of [her] children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality). If the biological father also has a fundamental right to make decisions regarding the children, the parents must work together to make those decisions. But when the father has no constitutionally protected interest a law that allows him to interfere with the mother's exercise of her rights raises serious due process concerns. *Id.* at 68–69 (holding that mother's due process rights were violated when state law provided visitation rights for grandparents against mother's wishes).

3. The state court's interpretation also has profound implications for Indian children. Although this Court has yet to fully address "the nature of a child's liberty interests in preserving established familial or family-like bonds," *id.* at 88 (Stevens, J., dissenting); *see also Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989), such an interest surely exists. That interest is plainly implicated when a child is placed with adoptive parents, without objection from an unwed father who had expressly relinquished his parental rights, and is then separated from the only family she has ever known.

This Court need not reach these constitutional issues. Rather than interpreting ICWA to provide rights to unwed Indian fathers who have played no role in their children's upbringing, the Court should apply the canon of constitutional avoidance and interpret "parent" to incorporate state law limitations on the parental rights of unwed fathers. *See Edward J. DeBartolo Corp.*, 485 U.S. at 575.

III. The State Court's Interpretation Would Preempt Parentage Laws in Most States.

This Court has never extended constitutional protections to unwed fathers based solely on biology. Rather, a state must provide parental rights only to those unwed fathers who have "demonstrate[d] a full commitment to the responsibilities of parenthood." *Lehr*, 463 U.S. at 261. Relying on this constitutional principle, most states distinguish between the parental rights of unwed fathers who demonstrate a commitment to raising their children and those who do not. As a result, adopting the South Carolina court's interpretation of "parent" would affect adoptions of Indian children across the country because the vast majority of states have enacted laws that impose limitations on the rights of unwed fathers.

Today, roughly half of the states have enacted the UPA or laws that follow a similar approach.[7] In

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[7] By 2000, 19 states had adopted the original UPA, while still others enacted significant portions of it. *See* Uniform Parentage Act of 2002, Prefatory Note. A subsequent version of the UPA, promulgated in 2002, has been enacted in nine states. Uniformlaws.org, Uniform Law Comm'n, Legislative Fact (continued...)

these states, an unmarried man is presumed to be a father of a child only if he is listed on the child's birth certificate, if he provides financial support to the child or in relation to the pregnancy, or if he openly holds himself out to be the biological father of the child and receives the child into his home. *See supra* pp. 12–13.[8] When an unwed father takes the steps necessary to become a "presumed father," he is then provided parental rights under state law.[9] But under the South Carolina court's interpretation of ICWA, an unwed Indian father's compliance with these laws is optional. Even if he fails to take the steps to become a "presumed father" under state law, he still receives the same parental rights under federal law.

Many states have also established putative father registries to facilitate notice to unwed fathers. These registries, enacted in 24 states, require a man who believes he may have fathered a child out of wedlock to promptly document and acknowledge

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Sheet—Parentage Act, http://uniformlaws.org/Legislative FactSheet.aspx?title=Parentage Act.

[8] *See* Ala. Code § 26-17-204(a); Ark. Code Ann. § 9-10-108(b); Cal. Fam. Code § 7611; Colo. Rev. Stat. § 19-4-105; Del. Code Ann. tit. 13, § 8-204(a)(5); Haw. Rev. Stat. § 584-4; 750 Ill. Comp. Stat. 45/5; Kan. Stat. Ann. § 23-2208; Mass. Gen. Laws ch. 209C, § 6(a); Minn. Stat. § 257.55; Mo. Rev. Stat. § 210-822; Mont. Code Ann. § 40-6-105(1); Nev. Rev. Stat. § 126.051, N.J. Stat. Ann. § 9:17-43; N.M. Stat. § 32A-5-3(*V*); N.D. Cent. Code § 14-20-10, Ohio Rev. Code Ann. § 3111.03; R.I. Gen. Laws § 15-8-3; S.C. Code Ann. § 63-9-730; Tenn. Code Ann. § 36-2-304; Tex. Fam. Code Ann. § 160.204; Wash. Rev. Code § 26.26.116.

[9] *See* Hollinger, 1-2 *Adoption Law & Practice* § 2.04[2][c][i].

paternity or the possibility of paternity.[10] Because putative father registries are based on the view that enrollment demonstrates the father's intent to assume responsibility for the care of his children, enrollment entitles the father to notice of any subsequent adoption or custody proceedings. *See generally* Mary Beck, *Toward a National Putative Father Registry*, 25 Harv. J.L. & Pub. Pol'y 1031, 1039–42 (2002).[11] The South Carolina court's interpretation of ICWA also makes compliance with these parent registry laws optional. Even in states that deny parental rights to unwed fathers who fail to enroll on a parent registry, the state court's interpretation allows an unwed Indian father to obtain parental rights without enrolling on the registry.

In addition to the state laws addressing notice for unwed fathers, many states impose additional

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[10] *See* Ala. Code § 26-10C-1; Ariz. Rev. Stat. Ann. § 8-106.01; Ark. Code Ann. § 20-18-702; Del. Code Ann. tit. 13, §§ 8-401 to -423; Fla. Stat. § 63.054; Ga. Code Ann. § 19-11-9(d); 750 Ill. Comp. Stat. 50/12.1; Ind. Code § 31-19-5; Iowa Code § 144.12A; La. Rev. Stat. Ann. § 9:400; Minn. Stat. § 259.52; Mo. Rev. Stat. § 192.016; Mont. Code Ann. §§ 42-2-202 to -204; Neb. Rev. Stat. § 43-104.01; N.H. Rev. Stat. Ann. § 170-B:6(c); N.M. Stat. § 32A-5-20; N.Y. Soc. Serv. Law § 372-c; Ohio Rev. Code Ann. § 3107.062; Okla. Stat. tit. 10, § 7506-1.1; Tenn. Code Ann. § 36-2-318; Tex. Fam. Code Ann. §§ 160.401–.402; Utah Code Ann. §§ 78-45g-401 to -410; Va. Code Ann. §§ 63.2-1249 to -1253; Wyo. Stat. Ann. § 1-22-117.

[11] Some registry forms require the enrollee to express a willingness and intent to support the child. *See, e.g.*, Ariz. Rev. Stat. § 8-106.01(A); *see also* UPA § 404, comment (2002) ("[T]he registry provides a clear procedure for determining that a man does not intend to assert parental rights with regard to the infant.").

requirements for an unwed father to satisfy before he is granted substantive parental rights, such as the ability to veto an adoption. *See* Hollinger, 1-2 *Adoption Law & Practice* § 2.04[2][c] ("In order to acquire a right to consent to, or to veto their child's adoption, unwed fathers must meet additional formal requirements, such as marrying the mother, or must behave in ways that are sufficiently 'parental,' such as supporting the child financially . . . ." (internal citation omitted)).

The South Carolina law at issue in this case provides a good example. To exercise the right to withhold consent and block an adoption in the first six months of the child's life, an unwed father must have taken the additional steps of either (i) openly living with the child and holding himself out to be the biological father, or (ii) providing financial support to the child or in connection with the mother's pregnancy. *See* S.C. Code Ann. § 63-9-310(A)(5). The law is even more demanding for an adoption initiated more than six months after the child's birth. In that circumstance, the father must have "maintained substantial and continuous or repeated contact with the child," evidenced by his financial support, regular visits that occur at least monthly, or regular communication. *Id.* § 63-9-310(A)(4).

Many states have similar laws. Currently, the laws in at least 33 states and the District of Columbia consider whether an unwed father has provided financial support to the mother during her pregnancy or to the child following birth to

determine whether the unwed father's consent is necessary for an adoption.[12] And at least 30 states consider whether an unwed father has developed a personal or emotional relationship with the child, including through meaningful or regular communication.[13] Unless the unwed father satisfies

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[12] *See* Ala. Code § 26-10A-9(1); Alaska Stat. § 25.23.050(a)(2)(b); Ark. Code Ann. § 9-9-207(a)(10); Cal. Fam. Code § 8604; Colo. Rev. Stat. § 19-5-203(1)(d)(II); Del. Code Ann. tit. 13, §§ 1103(a)(2)(a)(1)(A), 1106(a)(e); D.C. Code § 16-304(d); Fla. Stat. § 63.062(2)(a)(1); Ga. Code Ann. § 19-8-10(b)(2); Haw. Rev. Stat. § 578-2(c)(1)(D); Idaho Code Ann. § 16-1504(1)(e); Ind. Code Ann. § 31-19-9-8(a)(2)(B); Kan. Stat. Ann. § 59-2136(d), (e)(5), (h)(1)(C)–(D); Ky. Rev. Stat. Ann. §§ 199.500(1)(d), 625.065(1)(e); La. Child. Code Ann. art. 1245(B)(1), (C)(1); Md. Code Ann., Fam. Law § 5-3B-22(b)(1)(iii)(2); Mass. Gen. Laws Ann. ch. 210, § 3(c)(xi); Mich. Comp. Laws Ann. §§ 710.43(1)(a)(i), 710.51(6)(a); Neb. Rev. Stat. § 43-104.22(3); N.H. Rev. Stat. Ann. § 170-B:6(I)(d); N.J. Stat. Ann. § 9:3-46(a); N.M. Stat. § 32A-5-18(A)(2); N.Y. Dom. Rel. Law § 111(d); N.D. Cent. Code § 14-15-06(1)(b)(2); Ohio Rev. Code Ann. § 3107.07(A), (B)(2)(b); Okla. Stat. tit. 10, § 7505-4.2(B)–(C); 23 Pa. Cons. Stat. §§ 2511(a)(6), 2714; R.I. Gen. Laws §§ 15-7-5, -7(a)(1); S.C. Code Ann. § 63-9-310(A)(4)(a), -310(A)(5)(b); S.D. Codified Laws § 25-6-4(4); Tenn. Code Ann. § 36-1-113(g)(9)(A)(i)–(ii); Utah Code Ann. § 78B-6-121(1)(a)(iii); W. Va. Code §§ 48-22-301(b)(3), -306(a)(1) & (b)(2)–(3); Wy. Stat. Ann. § 1-22-110(a)(iv).

[13] *See* Ala. Code § 26-10A-9(1); Alaska Stat. § 25.23.050(a)(2)(a); Ark. Code Ann. § 9-9-207(a)(10); Cal. Fam. Code § 8604; Del. Code Ann. § tit. 13, §§ 1103(a)(2)(a)(1)(B), 1106(a)(e); Fla. Stat. § 63.062(2)(a)(1); Ga. Code Ann. § 19-8-10(b)(1); Haw. Rev. Stat. § 578-2(c)(1)(D); Idaho Code Ann. § 16-1504(1)(e); Ind. Code Ann. § 31-19-9-8(a)(2)(A); Kan. Stat. Ann. § 59-2136(d), (h)(2)(B); La. Child. Code Ann. art. 1245(B)(2), (C)(2); Md. Code Ann., Fam. Law § 5-3B-22(b)(1)(iii)(1); Mass. Gen. Laws Ann. ch. 210, § 3(c)(x); Mich. Comp. Laws Ann. §§ 710.43(1)(a)(i), 710.51(6)(b); Miss. Code Ann. §§ 93-17-7, 93-15-103(3)(b) & (d)(i); N.J. Stat. Ann. § 9:3-46(a); N.M. Stat. § 32A-5-18(A)(2); N.Y. Dom. Rel. Law § 111(d); N.D. Cent. Code § 14-15-

(continued...)

one or both of these criteria, he has no right to block an adoption in these states.[14]

As evidenced by the South Carolina court's decision in this case, if ICWA's definition of "parent" does not incorporate state law, the laws of more than 30 states will be preempted. Exercising their traditional legislative power over domestic relations, these states have made a policy judgment that when an unwed biological father has not provided support to the unwed mother and child, he should have no right to object to the mother's decision to place the child for adoption. This Court should not interpret ICWA to preempt these state laws as applied to unwed Indian fathers.

CONCLUSION

For the reasons set forth above, as well as the reasons set forth in the Brief of Adoptive Couple and Brief of Guardian Ad Litem, as Representative of Respondent Baby Girl, the decision of the Supreme Court of South Carolina should be reversed.

06(1)(b)(1); Ohio Rev. Code Ann. § 3107.07(A); Okla. Stat. tit. 10, § 7505-4.2(H); Or. Rev. Stat. § 109.324; 23 Pa. Cons. Stat. §§ 2511(a)(6), 2714; R.I. Gen. Laws §§ 15-7-5, -7(a)(4); S.C. Code Ann. § 63-9-310(A)(4)(b)–(c), -310(A)(5)(a); Tenn. Code Ann. § 36-1-113(g)(9)(A)(iii); Utah Code Ann. § 78B-6-121(1)(a)(i); Va. Code Ann. § 63.2-1202(H); W. Va. Code §§ 48-22-301(b)(3), -306(a)(2) & (b)(4);

[14] Other states also consider these factors in determining whether a father has deserted or abandoned his child. *See, e.g.*, Fla. Stat. § 63.072(a); 750 Ill. Comp. Stat. 50/8(a)(1), 50/1(D)(a)–(c); Iowa Code § 600.7(4); Maine Rev. Stat. Ann. tit. 18-A, §§ 9-302(b)(1)(iii), 9-201(*i*); Minn. Stat. § 259.24, subd. 1(a)(2); Mo. Rev. Stat. § 453.040(7).

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A Minor Child Under the Age of Fourteen Years, BIRTH FATHER, and the CHEROKEE NATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF FOR THE INTER TRIBAL COUNCIL OF ARIZONA, AK-CHIN INDIAN COMMUNITY, COLORADO RIVER INDIAN TRIBES, FORT MCDOWELL YAVAPAI NATION, HOPI TRIBE, THE PASCUA YAQUI TRIBE OF ARIZONA, AND TOHONO O'ODHAM NATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS BIRTH FATHER AND CHEROKEE NATION

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5 Thomas A. Jacobs, Arizona Juvenile Law & Practice § 5:1 (2012-2013 ed.) 10

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INTEREST OF *AMICI CURIAE*[1]

The Inter Tribal Council of Arizona ("ITCA") has provided a united voice for the majority of sovereign tribal governments in the State of Arizona since 1952.

While the twenty-one federally recognized Indian tribes, nations, bands and communities which comprise the ITCA ("Arizona Tribes" or "Tribes")[2] are politically distinct bodies, they share common interests as sovereign governments in promoting the welfare of the tens of thousands of tribal members who live on their reservations or outside reservation boundaries, as well as a common interest in the welfare of children that are tribally enrolled or eligible for enrollment. ITCA supports the common interests of the

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[1] No counsel for a party authored this brief in whole or part, and no one other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. According to this Court's docket, consent to the filing of *amicus curiae* briefs has been given by all parties.

[2] The ITCA Member Tribes are: the Ak-Chin Indian Community; Cocopah Indian Tribe; Colorado River Indian Tribes; Fort McDowell Yavapai Nation; Fort Mojave Tribe; Gila River Indian Community; Havasupai Tribe; Hopi Tribe; Hualapai Tribe; Kaibab Band of Paiute Indians; Pascua Yaqui Tribe; Pueblo of Zuni; Quechan Tribe; Salt River Pima-Maricopa Indian Community; San Carlos Apache Tribe; San Juan Paiute Tribe, Tohono O'odham Nation; Tonto Apache Tribe; White Mountain Apache Tribe; Yavapai-Apache Nation; and Yavapai-Prescott Indian Tribe.

In addition to participating in this brief as Member Tribes of the ITCA, the Ak-Chin Indian Community, Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Hopi Tribe, The Pascua Yaqui Tribe of Arizona, and Tohono O'odham Nation each joins this brief as *amicus curiae* in its own right.

Arizona Tribes through advocacy at the state and federal levels, and participation in judicial proceedings that have the potential to affect these common interests.

The questions presented in this case involve determinations under the Indian Child Welfare Act ("ICWA") – determinations which regularly affect the children of the Arizona Tribes, the Tribes' adult members, and the Tribes themselves. The resolution of the questions presented has the potential to affect the Arizona Tribes' right to receive notice of ICWA cases involving Indian children, and right to participate in these cases. It is essential to the interests of the ITCA and the Arizona Tribes that the ICWA be consistently interpreted and applied, now and in the future, to provide the full protections intended by Congress, and that the Tribes' rights to notice and participation are not diminished. Anything less would be detrimental to the Tribes, parents, and children – who themselves are nothing less than the Tribes' future.

SUMMARY OF THE ARGUMENT

In response to staggering and widespread abuses by state governmental and private agencies in child custody matters involving Indian children, Congress enacted the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.*, to provide safeguards to parents and Indian tribes involved in such proceedings. In Arizona, where Indian children suffered rates of separation

from their families far greater than the majority population, the implementation of ICWA has enabled the regular participation by tribes in hundreds of state child custody proceedings, to the benefit of Indian children and families, tribal governments, and state court proceedings.

A key reason for this ongoing participation is the fact that Arizona courts have rejected the Existing Indian Family doctrine (EIF), a judicially created exception that limits ICWA's application to cases where a child is raised in an "Indian family," and have refused to limit ICWA's definition of "parent" to the strictures of state paternity laws. Petitioners and Respondent GAL present this Court with an interpretation of ICWA that stands in direct opposition to Arizona's precedent. Petitioners and Respondent GAL's interpretation strikes at the core of ICWA's protections, in particular undermining the tribal right to notice under 25 U.S.C. § 1912(a) and intervention under 25 U.S.C. § 1911(c). The imposition of EIF or a definition of "parent" that is dependent on state law would saddle Arizona's already overburdened child welfare system with complex and fact-intensive determinations at the outset of proceedings involving Indian children. Such determinations would be made all the more difficult with weakened tribal notice and intervention provisions, as a tribe may be excluded from the very proceedings by which it is determined whether a child is an Indian child.

Petitioners' attempts to evade the controversy surrounding EIF by limiting its purview to Indian

parents with "preexisting parental rights" ignore ICWA's extensive legislative history and the reality of tribal culture in states like Arizona, where Indian and non-Indian communities often thrive in close proximity to one another and where it may be possible for a child to maintain connections with her Indian family irrespective of her custodial placement. Petitioners' arguments simply result in more uncertainty concerning the placement of Indian children, to their detriment and the detriment of their families and tribes. This Court should reject this outcome and affirm the decision of the South Carolina Supreme Court.

ARGUMENT

I. Tribal Participation is a Fundamental Aspect of ICWA and Should Be Protected.

A. Arizona Child Welfare Proceedings Involving Indian Children Have a Continuing Need for Tribal Involvement.

The vexing injustices Congress sought to remedy in passing ICWA are well documented by Respondent Birth Father, Cherokee Nation, and other *amici* supporting affirmance, and will not be repeated at length here. It is clear, however, that prior to the enactment of the ICWA, failure by states and nongovernmental organizations to recognize and understand Indian values and customs led to an alarming displacement of Indian children from their families and tribes

throughout the United States, resulting in numerous violations of tribes' and tribal members' fundamental interests in the rearing of Indian children. *See* 25 U.S.C. § 1901(4)-(5); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-36 (1989).

The state of affairs in Arizona prior to the passage of the ICWA typified the disturbing trends seen nationally. Shortly before the ICWA was enacted, the number of Indian children in Arizona who were adopted was proportionately 4.2 times higher than the number of non-Indian children who were adopted. S. Rep. No. 95-597 at 46 (1977). One out of every 98 Indian children in Arizona was in foster care at that time – a number proportionately 2.7 times higher than that for non-Indian children. *Id.* When adoption, foster care, and federal boarding schools were accounted for, Indian children in Arizona were separated from their families 27.3 times more often than non-Indian children. *To Establish Standards for Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and For Other Purposes: Hearing on S. 1214 Before the S. Comm. on Indian Affairs*, 95th Cong. 544 (1977) (App. G – Indian Child Welfare Statistical Survey, July 1976). According to one 1977 report, "[n]early all Arizona Indian children placed in adoption in past years were sent out of state." *Id.* at 414 (App. C – Prepared Statement from Jewish Children and Family Services of Phoenix).

Congress enacted ICWA to change the bleak course that Indian children and their tribes were set

on decades ago. Since its passage, ICWA's provisions regarding notice to and involvement by Indian tribes in ICWA cases have enabled tribes to play a key role in the cases affecting their children. Tribal participation in ICWA cases is a fundamental exercise of tribal sovereignty, and allows the tribes and states to work together to achieve the best results for the children involved.

The need for tribal involvement in ICWA cases and for cooperation between the tribes and the states on these matters continues to be vital. As of September 30, 2012, the last reporting period for which data is available, 14,111 children in Arizona were living in out-of-home care. Of these, 1,041, or 7.4%, were classified by the State of Arizona as Native American. Ariz. Dep't. of Econ. Sec., Division of Children, Youth and Families, *Child Welfare Reporting Requirements, Semi-Annual Report for the Period of April 1, 2012 through September 20, 2012* (January 24, 2013), at 40, available at https://www.azdes.gov/InternetFiles/Reports/pdf/Child_Welfare_Semi_Annual_Report.pdf (last visited March 26, 2013).

B. Arizona Tribes Regularly Participate in Child Welfare Cases Involving Indian Children, to the Benefit of Indian Children, Tribes, Families, and State Court Proceedings.

The continuing importance of ICWA to the interests of the ITCA and the Arizona Tribes is demonstrated

by the Tribes' active and consistent participation in hundreds of ICWA cases affecting their members and potential members each year, and the time and resources committed to their efforts. While the Tribes' policies on involvement vary, participation in ICWA cases is widespread among the tribes in Arizona.

Arizona Tribes may assign in-house counsel and employ full-time case managers to oversee ICWA cases. They may formally intervene in cases, or participate through regular contact with the agencies and parties, through the provision of services to Indian children and families, and in locating and consulting on potential placements. Some Tribes participate in ICWA cases in dozens of states each year. Tribal participation fosters mutual respect between tribal and state child welfare departments and between the offices of tribal attorneys general and state attorneys general. For many Arizona Tribes, some of the most significant contact between tribal government and state courts occurs in the context of ICWA cases.

The Arizona Tribes' participation in ICWA cases is not dependent upon whether a parent is involved in the matter. In fact, cases in which parents are absent are frequently the cases that benefit most from tribal involvement. Tribes provide critical services to the child and foster family, search for appropriate placements pursuant to 25 U.S.C. § 1915, and in many cases, reintroduce the child to a culture that would otherwise be lost to him or her.

C. ICWA's Notice and Intervention Provisions are Essential to the Participation of Tribes in the Arizona Child Welfare System.

The Arizona Tribes would have no ability to preserve their interests and the interests of Indian children in foster care and termination proceedings without the right to notice, which, in the estimation of the Department of the Interior, constituted a "major element" of ICWA. H.R. Rep. No. 95-1386 at 31 (Report of the Department of the Interior, June 6, 1978). ICWA's sponsors were keenly aware that tribes lacked such a right under existing state law. 124 Cong. Rec. H12849 (daily ed. Oct. 14, 1978) (statement of Rep. Lagomarsino) ("Generally, there are no requirements for responsible tribal authorities to be consulted about or even informed of child removal actions by nontribal government or private agents"). Consequently, Section 1912(a) of ICWA, along with the Department of the Interior's implementing regulations at 25 C.F.R. Part 23, establish clear cut requirements that a tribe, *in addition to a parent*, be notified "where the court knows or has reason to know that an Indian child is involved" in an involuntary proceeding in state court that seeks foster care placement of, or termination of parental rights to, an Indian child. Under the regulations, notice must be provided by registered mail, return receipt requested, to the tribe. *Id.* Tribes are permitted to establish designated agents for receipt of such notice, and a list of such agents is published in the Federal Register on

an annual basis. 25 C.F.R. § 23.12. In cases where the identity of the tribe cannot be determined, notice is provided to the Secretary of the Interior through Bureau of Indian Affairs area offices, which are then charged with notifying the appropriate tribe. 25 U.S.C. § 1912(a); 25 C.F.R. 23.11(c)-(g).

Similarly, 25 U.S.C. § 1911(c) allows tribes to intervene as a matter of right "at any point" in a state court foster care placement or termination of parental rights proceeding involving a child that is a member of, or eligible for membership in, that tribe.[3] Intervention not only protects the tribe's interests, but provides an invaluable resource to state and private agencies by locating potential placements with relatives and identifying benefits (such as family assistance, college scholarships, and the ability to participate in cultural events) for the Indian child. An intervening tribe can also help educate state courts on tribal cultural and social standards that would not otherwise be apparent in the tribe's absence.

ICWA's notice and intervention provisions form the basis for all future involvement by a tribe in state child custody proceedings involving Indian children. ICWA's clear standards for notice and intervention

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[3] The authority of a tribe to determine membership criteria "has long been recognized as central to its existence as an independent political community." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

provide a manageable mechanism for this involvement in a child welfare system that is "overworked, understaffed, and underfunded." 5 Thomas A. Jacobs, Arizona Juvenile Law & Practice § 5:1 (2012-2013 ed.). The regular participation by the Arizona Tribes in these proceedings is a testament to this manageability. In most cases,[4] the provision of notice and the granting of intervention has become routine, allowing the tribe, the court, and the applicable agencies to efficiently identify when an Indian child is at issue, and to focus together on the welfare and best interests of that child.

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[4] Despite ICWA's clear standards, a 2005 review of state child welfare systems by the Administration for Children and Families for the Department of Health and Human Services revealed that, in Arizona, "compliance with ICWA is not always consistent with the intent or spirit of the law from district to district, and that efforts are not made to determine the applicability of ICWA in all cases." U.S. Gov't Accountability Office Rep. 05-290, "Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States" at 52 (April 2005), available at http://www.gao.gov/new.items/d05290.pdf (last visited March 26, 2013). As the title of the report suggests, such findings reemphasize the need for guidance to states on following ICWA's standards.

II. Adopting the Existing Indian Family Doctrine, or a State Law Based Definition of "Parent," Would Complicate Child Custody Proceedings, Interfere with the Tribes' Rights to Notice and Intervention, and Harm Indian Children.

A key reason that Indian tribes are able to be such active and constructive participants in Arizona's child welfare process is the fact that Arizona state courts have rejected the interpretation of ICWA advanced by Petitioners and Respondent GAL. In two well-reasoned decisions, the Arizona Court of Appeals rejected EIF, *Michael J. Jr. v. Michael J. Sr.*, 7 P.3d 960, 963 (Ariz. Ct. App. 2000), and interpreted ICWA's definition of "parent" to include an unwed father even in the absence of a formal action to establish paternity under state law, *see id.*; *Jared P. v. Glade T.*, 209 P.3d 157, 161 (Ariz. Ct. App. 2009). As discussed further below, these judicial decisions have allowed Arizona to avoid injecting further confusion and uncertainty into an already overburdened child welfare system.

A. Arizona's Courts Have Furthered ICWA's Goals by Rejecting the Existing Indian Family Doctrine and by Not Restricting ICWA's Definition of "Parent" to State Law.

Michael J. Jr. concerned proceedings substantially similar to the present case. Unable to care for her child, a non-Indian mother requested the involvement

of the State's child welfare agency, who initiated child custody proceedings in state court. 7 P.3d at 961. At the time of the child's birth, the father, a member of the Tohono O'odham Nation, was incarcerated and had not established paternity, although he later acknowledged paternity before the juvenile court and underwent a paternity test that confirmed him as the biological father of the child. *Id.* at 962-63. In accordance with ICWA, the Nation was notified of the proceedings and was permitted to intervene following its assertion that the child was eligible for enrollment with the Nation. *Id.* at 961. The trial court subsequently transferred the case to the Nation's tribal court, and the child's guardian ad litem appealed, arguing that that the child could not qualify as an "Indian child" under ICWA because the father never filed a paternity action or sought legal custody of the child, and because the child was not removed from an existing Indian family. *Id.* at 962-63.

Rejecting these arguments, the Arizona Court of Appeals noted that the father's acknowledgment and subsequent paternity testing, coupled with the Nation's confirmation of the child as an Indian child, provided "ample evidence to support the trial court's finding that [the child] is an 'Indian child,' and Father, his parent." *Id.* at 963. With regard to EIF, the court decided to "join a growing number of jurisdictions in rejecting this judicially created exception," in part "to support ICWA's goal not only of preserving Indian families, but also of protecting the tribe's interests in the welfare of its Indian children and the

maintenance of its culture," and because ICWA's statutory language "does not require either that the child be part of an existing Indian family or that the family be involved with the tribe." *Id.*

In *Jared P.*, the same court was again faced with the initiation of a child custody proceeding involving a father that had not strictly complied with Arizona law for establishing paternity, but who had taken steps to acknowledge paternity by, among other things, challenging the petition to terminate his parental rights, by writing a letter to the court acknowledging paternity, and by submitting to a paternity test. 209 P.3d at 162. The court found these actions were enough to comply with ICWA. *Id.*; *see also*, *Bruce L. v. W.E.*, 247 P.3d 966, 979 (Alaska 2011) (citing *Jared P.* and other state cases for the proposition that "to qualify as an ICWA parent an unwed father does not need to comply perfectly with state laws for establishing paternity, so long as he has made reasonable efforts to acknowledge paternity"); Ariz. Rev. Stat. Ann. § 8-106(I)(9) (requiring that notice to putative fathers provide that "[T]he Indian child welfare act may supersede the Arizona Revised Statutes regarding adoption and paternity").[5]

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[5] The Arizona state court holdings are reinforced by the canon of construction applicable to Indian law providing that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (citing *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174 (1973);

(Continued on following page)

B. Adopting the EIF or a Definition of "Parent" Restricted by Varying State Laws Would Complicate Cases Under ICWA and Deprive Arizona Tribes of the Opportunity to Participate in Cases Involving Indian Children.

The Arizona court decisions in *Michael J.* and *Jared P.* have ensured that ICWA provisions for determining whether a child is an Indian child, including notice to parents and tribes, apply at the outset of Arizona child custody proceedings. The arguments advanced by Petitioners and Respondent GAL would instead require Arizona's courts to either determine, at the outset of such proceedings, whether a child's family is sufficiently Indian and connected to the child to warrant ICWA's application, or to limit the application of ICWA in cases where a parent does not

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Choate v. Trapp, 224 U.S. 665, 675 (1912)). This canon is appropriately applied in ICWA cases, as "[t]he purpose of ICWA was to rectify state agency and court actions that resulted in the removal of Indian children from their Indian communities and heritage." *Doe v. Mann*, 415 F.3d 1038, 1047 (9th Cir. 2005); *see also, State ex rel. C.D.*, 200 P.3d 194, 204 (Utah Ct. App. 2008) (applying canon in interpreting ICWA). Thus, to the extent that ICWA's provisions are ambiguous, such ambiguity should be resolved in favor of Indians and Indian tribes.

As Respondent Birth Father notes (Resp't's Br. 21-22), the words "acknowledge" and "establish" as used in 25 U.S.C. § 1903(9) have ordinary and unambiguous meanings that do not require reliance on state law. Nevertheless, even if this Court were to find that these terms are ambiguous, they should be interpreted to the benefit of Birth Father and the Cherokee Nation.

take "affirmative steps to acquire parental rights" pursuant to state law. (Pet'rs' Br. 20). Respondent Cherokee Nation and other *amici* counter convincingly that such requirements, if adopted, would severely damage the interest of tribes in the welfare of Indian children and contravene Congress' intent in passing ICWA. In addition, such requirements would complicate child welfare proceedings in Arizona by saddling state court judges with time-consuming and fact-intensive threshold inquiries, by adding confusion to ICWA's notice and intervention requirements, and by limiting or eliminating a tribe's right to intervene, and a child's access to tribal benefits and familial connections. In the end, breaking from Arizona's common sense approach would create uncertainty for the placement of Indian children.

1. Applying EIF or State Law Restrictions on the Definition of "Parent" Would Burden Child Welfare Proceedings with Subjective and Fact-Intensive Determinations.

Both EIF and a definition of "parent" dependent on state law would introduce fact-intensive and burdensome determinations at the outset of a proceeding involving a potential Indian child. This is especially troublesome given that "[a]ny delays in the proceedings in juvenile court . . . would undermine . . . the process of finding permanent placement for children." *Rita J. v. Ariz. Dep't. of Econ. Sec.*, 1 P.3d 155, 158 (Ariz. Ct. App. 2000). EIF requires that a state court

only apply ICWA if, after a case specific analysis, it determines that a given child has been removed from a family that has sufficient social, cultural, or political ties to an Indian tribe. *See, e.g.*, *In re M.B.*, 176 P.3d 977, 985 (Kan. Ct. App. 2008); *In the Matter of Catholic Charities and Cmty. Servs. of the Archdiocese of Denver, Inc.*, 942 P.2d 1380, 1382 (Colo. App. 1997); *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 529 (Cal. Ct. App. 1996). The court in *Bridget R.*, in a decision cited approvingly by the Petitioners (Pet'rs' Br. 45), noted that an EIF determination must be made "as of the time of the relinquishments," and that in doing so, a trial court should consider:

> [W]hether the parents privately identified themselves as Indians and privately observed tribal customs and, among other things, whether, despite their distance from the reservation, they participated in tribal community affairs, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, participated in Indian religious, social, cultural or political events which are held in their own locality, or maintained social contacts with other members of the Tribe.

49 Cal. Rptr. 2d at 531. As other courts have lamented, such an exhaustive examination is a "highly subjective one that state courts are ill-equipped to make," *In re Alicia S.*, 76 Cal. Rptr. 2d 121, 129 (Cal. Ct. App. 1998); *accord*, *In re Baby Boy C.*, 805 N.Y.S.2d 313, 324 (N.Y. App. Div. 2005). Under EIF,

however, it is a determination that would be required in hundreds of cases that courts address each year concerning Indian children.[6]

Petitioners try to skirt this factual morass by suggesting that the exposure of a child to "Indian culture or tribal politics" is only legitimate or possible through an Indian parent that possesses "preexisting parental rights" (Pet'rs' Br. 45). This flies in the face of the extensive legislative history concluding that Indian children are connected to their tribes in a myriad of ways beyond that child's custodial family. *See, e.g.*, H.R. Rep. No. 94-1386, at 10 (1978); *Holyfield*, 490 U.S. at 35 n.4. Petitioners' argument is especially inapplicable in Arizona, where the line of demarcation between tribe and municipality may merely be a city street or a riverbed, and where it is common for tribes to extend various services and resources to their off-reservation members in maintaining cultural, familial, and political connections with the tribe. An Indian child domiciled outside her tribe's reservation, whether with Indian or non-Indian parents, may in many cases continue her vital tribal connection through the provision of such resources and through

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[6] This is not to say that case-by-case determinations have no place in child custody proceedings involving Indian children. To the contrary, upon a showing of good cause, state courts may deviate from the Act's placement preferences, *see* 25 U.S.C. § 1915(a) and (b), or may deny a transfer of the proceedings to tribal court, *see* 25 U.S.C. § 1911(b).

regular contact with other tribal and family members.

Moreover, predicating the application of ICWA on a parent's establishment of "parental rights" under state law similarly introduces a whole host of potentially disputed factual issues, and does so again at the outset of a child custody proceeding. In Arizona cases not otherwise implicating ICWA, putative fathers must initiate paternity proceedings, comply with service requirements, and "proceed to judgment in the paternity action" in order to preserve parental rights. Ariz. Rev. Stat. Ann. § 8-106(G)(3), (4). Failure to comply with these provisions waives the right to notice or consent to the adoption. Ariz. Rev. Stat. Ann. § 8-106(J); *Jared P.*, 209 P.3d at 160. Petitioners argue (Pet'rs' Br. 26) that a father must also provide evidence of financial support for the child in order to trigger ICWA's requirements, thus adding yet another layer of factual complexity. *See also*, Br. of United States as *Amicus Curiae* at 19 ("Congress plainly did not contemplate a fact-intensive analysis at the threshold of whether [a father's status as a 'parent' for purposes of ICWA] was satisfied"); Barbara Ann Atwood, *Children, Tribes, and States: Adoption and Custody Conflicts Over American Indian Children* 168-69 (Carolina Academic Press 2010) (the application of state paternity laws in cases where only the father possesses Indian heritage "may interfere with the goals of ICWA").

2. Applying EIF or State Law Restrictions on the Definition of "Parent" Frustrates the Tribal Right to Notice and Intervention, to the Detriment of Arizona Tribes and Their Children.

While Petitioners and Respondent GAL concede in the present case that the child is an Indian child, and although the Cherokee Nation was permitted to intervene in the proceedings, this was *despite* "efforts to conceal [Birth Father's] Indian status," Pet. App. 6a, rather than efforts to comply with the Act. Reversing the South Carolina Supreme Court's decision in this case would only encourage such concealment and frustrate a tribe's notice and intervention rights under ICWA.

This is not idle speculation. Indeed, under EIF, a tribe would be entitled to notice pursuant to Section 1912(a) only "when the parent is both a 'good Indian' who is raising the child in an 'Indian family environment' . . . and a 'bad Indian' who is so lacking as a parent" that involuntary proceedings must be initiated. *In re Elliott*, 554 N.W.2d 32, 36 (Mich. Ct. App. 1996). This would "effectively allow the exception to swallow the rule." *Id.*; *see also*, *Hampton v. J.A.L.*, 658 So. 2d 331, 339 (La. Ct. App. 1995) (Stewart, J., dissenting) (under the majority's determination that EIF applied to a proceeding it was "unnecessary to notify the Indian tribe of an opportunity to intervene to protect its interest in a resource vital to its very existence"); *but see, In re Suzanna L.*, 127 Cal. Rptr. 2d 860, 867-68 (Cal. Ct. App. 2002) (assuming, without

deciding, that EIF applied to proceedings, holding that notice to a tribe would still be required under ICWA). The Existing Indian Family doctrine thus provides one more means to avoid informing tribes of child welfare proceedings involving Indian children.

Similarly, limiting ICWA's definition of "parent" by applying state law qualifications would not only preclude many putative Indian fathers from obtaining notice of child custody proceedings, but it may also preclude their tribes from obtaining notice or from participating in the proceedings. As with EIF, this is an example of the exception swallowing the rule. Under Petitioners' and Respondent GAL's reasoning, because an unwed father who has not technically preserved his parental rights pursuant to state law would not qualify as a "parent" under ICWA, an otherwise involuntary proceeding under 25 U.S.C. § 1912 would be transformed into a voluntary proceeding under 25 U.S.C. § 1913 merely by virtue of the mother's voluntary relinquishment of her parental rights to the Indian child. In such circumstances, ICWA's requirements for involuntary proceedings, including notice to the child's tribe, would arguably not apply. *Compare* 25 U.S.C. § 1912(a) *with* 25 U.S.C. § 1913.

This result – the termination of parental rights to an Indian child without notice to the child's tribe, and over the objection of the child's biological Indian parent – is clearly not what Congress intended in crafting ICWA's provisions. Rather, as this Court noted in *Holyfield*, ICWA recognizes that a tribe "has

an interest in the child which is distinct from but on a parity with the interest of the parents." 490 U.S. at 52 (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986)). To allow a father's alleged non-compliance with state law to undermine a tribe's federally-recognized right to notice of such a proceeding would thwart both Congress' intent and the tribe's interest in its children.

This result also muddies the waters for state courts trying to comply with ICWA and exacerbates existing inconsistencies with ICWA compliance. *See* n.4 *supra*. At one level, the lack of a right to notice of, and to participate in, such proceedings compounds the potential for error in determining the child's status. Parties to the proceeding may not know whether a child is already enrolled (and is thus an Indian child by definition). At another level, this lack of compliance does significant harm both to Arizona tribes and Arizona Indian children. Even in cases where a parent who has "rejected Indian life and culture" and chooses to relinquish her newborn Indian child to be adopted by a non-Indian couple, "the detriment to the Tribe is quite significant – the loss of two generations of Indian children instead of just one." *Baby Boy C.*, 805 N.Y.S.2d at 324.[7] For Arizona's Indian children, this loss is felt both in terms of limitations on access to the tribal benefits and services

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[7] *Baby Boy C.* concerned a child eligible for enrollment in the Tohono O'odham Nation of Arizona.

noted above, and more immediately, the uncertainty over placement and permanency that naturally stems from the additional procedural complications that would arise in Arizona if the arguments Petitioners and Respondent GAL advance are accepted.

CONCLUSION

For the reasons discussed above, ITCA, Ak-Chin Indian Community, Colorado River Indian Tribes, Fort McDowell Yavapai Nation, Hopi Tribe, The Pascua Yaqui Tribe of Arizona, and Tohono O'odham Nation respectfully request this Court to affirm the South Carolina Supreme Court decision in favor of Respondents Birth Father and the Cherokee Nation.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In The
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, a minor child under the age of fourteen years, BIRTH FATHER, and THE CHEROKEE NATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF *AMICI CURIAE* LOWER SIOUX INDIAN COMMUNITY, BOIS FORTE BAND OF CHIPPEWA, PRAIRIE ISLAND INDIAN COMMUNITY, FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, WHITE EARTH BAND OF OJIBWE, THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, THE GRAND PORTAGE BAND OF LAKE SUPERIOR CHIPPEWA, UPPER SIOUX COMMUNITY, THE LEECH LAKE BAND OF OJIBWE, THE MILLE LACS BAND OF OJIBWE, THE RED LAKE NATION, THE MINNESOTA CHIPPEWA TRIBE, AND THE INDIAN CHILD WELFARE ACT LAW CENTER IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether this Court should accept Petitioners' invitation to rewrite the statutory text of the Indian Child Welfare Act to:

(1) narrow its scope of applicability to certain "existing Indian families;" or

(2) to re-define "parent" under the Act;

despite the majority of reasoned decisions – including laws in Minnesota – that expressly provide to the contrary?

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INTEREST OF *AMICI CURIAE*[1]

Collectively, *amici* are the tribes and professionals in the state of Minnesota who are involved every day in child-custody proceedings involving Indian children. They are the on-the-ground litigants who witness the real-world consequences of the Indian Child Welfare Act ("ICWA" or "Act") and the application of state law to Indian children, their families, and their tribes. *Amici* support the South Carolina Supreme Court's decision, and the Respondents Birth Father and Cherokee Nation before this Court.

The Lower Sioux Indian Community, the Bois Forte Band of Chippewa, the Prairie Island Indian Community, the Fond du Lac Band of Lake Superior Chippewa, the White Earth Band of Ojibwe, the Shakopee Mdewakanton Sioux Community, the Grand Portage Band of Lake Superior Chippewa, the Upper Sioux Community, the Leech Lake Band of Ojibwe, the Mille Lacs Band of Ojibwe, the Red Lake Nation, and the Minnesota Chippewa Tribe (the "*Amici* Tribes") constitute every tribe that exists within Minnesota's state borders. The *Amici* Tribes are all federally recognized Indian tribes that exercise retained,

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been lodged with the Clerk.

inherent, sovereign authority over their territory and their members. Each of the *Amici* Tribes exercises governmental authority in matters involving the health and welfare of their tribal members, especially including their Indian children who are or may become involved in child-welfare proceedings in tribal, state, or federal courts. In a historic move, all eleven Minnesota tribes have joined together as *amici* before this Court, along with the Indian Child Welfare Act Law Center ("ICWA Law Center"). The ICWA Law Center is a non-profit, American Indian legal services organization located in Minneapolis, Minnesota. The ICWA Law Center advances the purposes of ICWA by (1) providing representation for Indian children and parents; (2) by advocating for systematic responses for better meeting the needs of Indian children and families through local, state, and national work groups; and (3) by training the legal and social service community about the historical necessity, practical application, and future implications of ICWA.

SUMMARY OF ARGUMENT

Before ICWA's passage, an Indian child in Minnesota was 3.9 times more likely to be placed for adoption than a non-Indian child, and 16.5 times more likely than a non-Indian child to live in foster care. S. Rep. No. 95-597, at 47 (1977) ("Senate Report"). In 1969, over 700 Minnesota foster homes were caring for Indian children; *only two* included an Indian parent. 123 Cong. Rec. 21043 (1977). These

realities resulted in Indian children losing their identities and tribes losing their future leaders at "alarming rates." 124 Cong. Rec. 38102 (1978); *see also* 25 U.S.C. § 1901.

Minnesota was not alone. Nationwide, Indian children and tribes were faced with the devastating consequences of lost familial and tribal connections. In response to this crisis, Congress carefully crafted ICWA "to protect the rights of the Indian child as an Indian and the rights of the Indian Community and tribe in retaining its children in its society." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (quoting H.R. Rep. No. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530 ("House Report")). ICWA provided a clear framework on which tribes and states could rely to foster intergovernmental cooperation in the placement of Indian children. ICWA purposely limited the conduct of states in removing Indian children from their homes and emphasized the role of tribes in protecting the best interests of Indian children. ICWA recognizes the fundamental connection between Indian children, their families, and their tribes.

As Congress intended, the Minnesota experience with ICWA has resulted in intergovernmental cooperation to meet the best interests of Indian children. The state of Minnesota, tribes located within Minnesota borders, and child-welfare experts have labored together to follow ICWA's blueprint and address the disparities in Indian-child placements. In 35 years of hard-won progress, Minnesota has used ICWA as a

springboard to build state statutes, state-tribal agreements, judicial resources, and processes. Minnesota has used these experiences to evaluate collectively what works and what does not – just as Congress intended.

Through these efforts, the tribes, the state, and child welfare experts in Minnesota have already addressed both questions presented by this case. First, ICWA applies to every Indian child regardless of whether an Indian child comes from an "existing Indian family." Second, the Act governs all proceedings involving Indian children, including by providing minimal national standards that define the "parents" of those Indian children. Minnesota has determined that altering ICWA through a judicially created exception or an imported definition is at odds with the plain language and the intent of the statute.

ICWA recognizes and protects the relationship between tribes and their children – *all* of their children – and Minnesota is committed to implementing the practices that give that policy vitality child-by-child and family-by-family. While disparities in the placement of Indian children continue to plague the child welfare system, in Minnesota the tribes, the state, and child welfare experts have committed to use the ICWA framework to address these disparities and in turn ensure the best interests of Indian children. Ensuring Indian children's connection to their tribes is in the best interests of all three groups that Congress intended ICWA to protect: Indian children, their families, and Indian tribes. This Court should

not cast aside that policy and decades of intergovernmental implementation by altering ICWA.

ARGUMENT

I. ICWA provides a platform of minimum standards upon which Minnesota works to protect the best interests of Indian children, their families, and their tribes.

Minnesota's history demonstrates the "crisis . . . of massive proportions," H.R. Rep. No. 95-1386, at 9, posed by the "wholesale removal of Indian children" from their families and tribes and placement with non-Indian foster-care and adoptive homes. *Holyfield*, 490 U.S. at 32 (citing *Indian Child Welfare Program, Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93d Cong. 3 (1974) (statement of William Byler) ("1974 Hearings")). According to conservative reports, before ICWA's passage, more than one in every eight Indian children in Minnesota under the age of 21 had been adopted. Senate Report, at 46-47. Of those adoptions, 97.5% were by non-Indian families. *Id.* Indian children in Minnesota were removed from their parents and placed in foster care or in adoptive homes five times more often than non-Indian children in Minnesota. House Report, at 9; *Holyfield*, 490 U.S. at 33 (citing, generally, 1974 Hearings).

Consistent with ICWA's policies of protecting the best interests of Indian children and promoting the

stability and security of Indian tribes and families, Minnesota is working to break from its ignoble past. *See* 25 U.S.C. § 1902. ICWA compels states like Minnesota, which has eleven federally recognized tribes within its borders, to address and eliminate the disproportionate number of Indian children taken from their families and tribes that resulted in such devastating consequences for Indian children, their families, and their tribes.

In Minnesota, Indian tribes act as economic centers, self-governing bodies politic, and governments that deliver critical services to their members. Because there can be no tribes without tribal leaders, nothing "is more vital to the continued existence and integrity of Indian tribes than their children." *Id.* ICWA was designed to promote the best interests of Indian children and tribes by providing procedural protections *before* Indian children's connections to their families and tribes are severed. *See Holyfield*, 490 U.S. at 34 (citing *Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 193 (1978)); *see also* 25 U.S.C. § 1902.

A. Minnesota has built on ICWA to develop state statutes, intergovernmental agreements, and tools to train its judiciary.

In Minnesota, ICWA has resulted in substantial improvements in the administration of Indian-child-welfare coordination and a broader cooperation

between the state and tribes. This intergovernmental cooperation has assured that all interested parties – the state, the tribe, the parents, and the Indian child – are involved in child custody proceedings, including adoptive placements, and that all parties have an opportunity to be heard.

Following ICWA's enactment, the state of Minnesota worked with the eleven tribes within the geographical boundaries of the state and with Indian-child-welfare experts. As a result of these efforts and after nearly five years of such consultation, in 1985, the Minnesota legislature passed the Minnesota Indian Family Preservation Act ("MIFPA"). Minn. Stat. §§ 260.751-260.835 (1985). The statute mirrors and, in some cases, builds on ICWA's construct. Minnesota has continued to learn from its experiences and has amended MIFPA several times. *See, e.g.*, Minn. Stat. § 260.755 (1999); Minn. Stat. § 260.755 (2007); Minn. Stat. § 260.755 (2012).

This intergovernmental consultation also resulted in the Minnesota Tribal-State Agreement, just as ICWA contemplated. *See* 25 U.S.C. § 1919(a). The Minnesota Tribal-State Agreement established common sense procedures to apply ICWA's minimum federal standards and insured that Minnesota meets ICWA's overarching priorities in ways that work on the ground in individual cases. Minn. Tribal/State Indian Child Welfare Agreement, Minn. Dep't of Human Servs. Bulletin #99-68-11 (Aug. 25, 1999). Subsequent real-world experience prompted an amended Tribal-State Agreement in 2007 ("2007 Agreement"). 2007

Tribal/State Indian Child Welfare Agreement, *available at* http://www.icwlc.org/docs/9-icwa_2007_tribal_state_agreement_dhs-5022-eng-2-07.pdf (last visited March 6, 2013). The stated purpose of the 2007 Agreement is "to protect the long term best interests, as defined by the Tribes, of Indian children and their families, by maintaining the integrity of the Tribal family, extended family and the child's Tribal relationship." 2007 Agreement, at 2. The 2007 Agreement acknowledges that Indian children are the future of their tribes and that they are vital to their tribes' existences. *Id.* at 3. It also acknowledges the belief that Indian children are sacred and close to the creator. *Id.*

These ICWA-prompted discussions and agreements also spurred expanded coordination between the state and tribal judiciaries. Joint efforts have included education of state-court judges about tribal courts, adoption of state rules addressing the effect of tribal-court orders, creation of workable state-court jurisdictional rules that provide clarity and certainty in ICWA cases, and development of an ICWA chapter of the Minnesota Judges Juvenile Protection Benchbook ("Benchbook"). *See* Minn. Gen. R. Prac. 10; Minnesota Rules of Juvenile Protection Procedure, Rule 48 (detailing procedures for transfers of jurisdiction to tribal courts); Minnesota State Court Administrator's Office, Court Services Division, *Minnesota Judges Juvenile Protection Benchbook* (2004-2011), *available at* http://www.mncourts.gov/?page=178.

Through these efforts, the state, tribes and child-welfare experts have committed to ending violations of ICWA to protect the best interests of Indian children and to strengthen Indian families and communities.

B. Minnesota's development of state law based on and around ICWA implements Congress's recognition of the distinct interests of Indian children and tribes.

Minnesota law expressly recognizes that compliance with ICWA is in the best interest of Indian children. As the Minnesota Court of Appeals has recognized, ICWA "aims to protect the best interests of Indian children, and to protect the tribes, by creating a minimum federal standard for placement proceedings." *In re Welfare of Children of C.V.*, No. A04-441, 2004 WL 2523127, at *3 (Minn. Ct. App. Nov. 9, 2004). Minnesota also recognizes the distinct interests of Indian tribes, domestic dependent sovereign governments possessing "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). Those powers – which predate the adoption of the Constitution – include the power to manage domestic relations of tribal members, *e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980), specifically and especially including child rearing. *E.g., Wakefield v. Littlelight*, 347 A.2d 228,

234-35 (Md. 1975) (*citing Williams v. Lee*, 358 U.S. 217 (1959)).

The United States built upon these inherent powers when it adopted ICWA in fulfillment of its fiduciary obligation to Indian tribes and their members, which "has long dominated the Government's dealings with Indians." *United States v. Mitchell*, 463 U.S. 206, 225 (1983). ICWA's principal sponsor was rightly concerned that state child-placement laws were causing tribes to be "drained of their children and, as a result, their future as a tribe." *Holyfield*, 490 U.S. at 34 n.3 (quoting 124 Cong. Rec. 38102 (1978)). In enacting ICWA, Congress recognized that "[t]he United States, as trustee for Indian tribal lands and resources, has a clear interest and responsibility to act to assist tribes in protecting their most precious resource, their children." *Id.* at 50 (quoting Senate Report at 52)); 124 Cong. Rec. 38103 (1978).

MIFPA and its amendments, the Tribal-State Agreement and subsequent 2007 Agreement, and relevant court rules and Benchbook instructions for ICWA case procedures all followed the path marked by Congress by prioritizing the best interests of Indian children and sovereign interests of tribes. This ICWA-driven intergovernmental cooperation has gone a long way toward assuring that all the interested parties in any case – the state, the tribe, the parents, and the Indian child – are involved in custody and placement proceedings (including adoptions) from the beginning and that the interests of all parties are before the court.

II. By following the plain language and policy of ICWA, Minnesota stakeholders have already resolved that ICWA applies regardless of state-law parenting rights.

Petitioners urge this Court to condition ICWA's procedural protections of Indian children and tribes on the state-law status of an Indian parent. But Minnesota stakeholders' intensive work to implement ICWA demonstrates both the necessity and the workability of following ICWA's plain definition of "Indian child." As even Petitioners acknowledge, the plain language of ICWA applies where there is an "Indian child," Pet. Br. 4 (citing 25 U.S.C. § 1903(1)(iv)); and it applies regardless of "[w]hether a non-custodial parent can invoke" ICWA. *Id.* at i. So here, once the South Carolina state court determined that the child is eligible for tribal membership (which she is) and is the biological child of an enrolled tribal member (which she is), ICWA applied (which it does).

This bright-line definition has proven effective in the Minnesota experience, where MIFPA incorporates ICWA's definition of "parent" for child custody proceedings. The two statutes use nearly identical language in defining "parent" to apply ICWA within the state. *See* Minn. Stat. § 260.755, subd. 14; 25 U.S.C. § 1903(9). MIFPA's use of ICWA's definition of "parent" makes sense. ICWA recognized that state actions and practices prior to the Act's passage had failed to recognize and protect the unique relationships between Indian children, their families, and their tribes. 25 U.S.C. § 1901(5). Thus, applying a state-law

definition of "parent" that applies to fewer people than the federal statutory definition is contrary to the text and purpose of ICWA.

Minnesota's judicial Benchbook illustrates that the MIFPA and ICWA statutory definition of "parent" is one that can easily be applied by practitioners and the judiciary. The Benchbook specifically directs the court administrator to give notice of ICWA hearings to parents whose rights have not been terminated, "including any alleged, adjudicated, presumed, or putative father who has acknowledged paternity, even if he has not legally established paternity." Benchbook, at 35-18. It further explains that the best practice is for the court to "direct the agency to continue its active efforts to notify non-custodial parents, including unwed fathers whose paternity has not been acknowledged or established." *Id.*

This bright line is important because Minnesota law explicitly recognizes that ICWA's statutory protections exist independent of parents. The 2007 Agreement similarly builds on ICWA's definition of "Indian child" and confirms that "[a] termination of parental rights does not sever the child's membership or eligibility for membership in the tribe" and that a tribe's determination that a child is a member or is eligible for membership "is conclusive." 2007 Agreement, at Part I § F(21). Thus, for any particular child, it is the tribal membership decision – not any parental decision or conduct – that triggers the protections of ICWA and MIFPA. By following the text and policy

of ICWA, Minnesota has already rejected Petitioners' argument. So, too, should this Court.

III. By following the plain language and policy of ICWA, Minnesota stakeholders have, like most jurisdictions, rejected the "existing Indian family" exception as inconsistent with ICWA.

The Court should also reject Petitioners' request to adopt the dying minority doctrine of the "existing Indian family exception." As Minnesota has recognized, this exception is inconsistent with the plain language of ICWA. Moreover, it is fundamentally at odds with the priorities of ICWA – the best interests of Indian children, Indian families, and Indian tribes.

A. The Tribal-State Agreement and Minnesota statutes both explicitly reject the "existing Indian family" exception.

In negotiating the terms of Minnesota's 2007 Agreement, child-custody practitioners, leaders and members of the eleven tribes, and state officials carefully considered the ramifications of applying the "existing Indian family exception." These parties considered the text of ICWA and the statute's purpose in negotiating whether and how the 2007 Agreement would treat the "exception." Their ultimate guide, however, was their desire to craft the best rule of law for Indian children in Minnesota. And their decision was unequivocal. The 2007 Agreement repeats the

definition of "Indian child" found in ICWA and continues:

> The parties agree that this statutory definition of an Indian child applies without exception in any child custody proceeding. Whether an Indian child is part of an Indian family or has established a connection to her or his tribe is not a consideration in determining the applicability of the Indian Child Welfare Act or the Minnesota Indian Family Preservation Act to an Indian child. The parties to this agreement explicitly reject any existing Indian family exception or doctrine.

2007 Agreement, at 14.

The Minnesota legislature reached the same result in considering amendments to the coordinate MIFPA statute. After hearing testimony from state and tribal leaders, the state legislature recognized that the purported "exception" disregards the continuing interest of *all* Indian children in growing up in tribal environments and entirely ignores Congress's purposeful consideration of tribes' separate interests in ICWA proceedings. *See* Minnesota Legislature, *Comm. Hearings and Actions for S.F. 1221 Before the Comm. on Health, Housing, and Family Sec.*, 85th Sess. (March 21, 2007), *available at* http://www.senate.leg.state.mn.us/schedule/unofficial_action.php?ls=85&bill_type=SF&bill_number=1221&ss_number=0&ss_year=2007. The legislature squarely rejected the exception and provided that MIFPA applies:

> to child custody proceedings involving an Indian child whether the child is in the physical or legal custody of an Indian parent, Indian custodian, Indian extended family member, or other person at the commencement of the proceedings. *A court shall not determine the applicability of this chapter or the federal Indian Child Welfare Act to a child custody proceeding based upon whether an Indian child is part of an existing Indian family or based upon the level of contact a child has with the child's Indian tribe, reservation, society, or off-reservation community.*

Minn. Stat. § 260.771, subd. 2 (2012) (emphasis added).

But even before the Minnesota statute and Tribal-State Agreement, the judiciary in Minnesota acknowledged that the "existing Indian family" exception was fundamentally at odds with ICWA's text. For example, the Minnesota Court of Appeals noted, in a published opinion, a district court's conclusion that an argument based on the existing Indian family exception was "without merit[.]" *In re Welfare of Children of S.W.*, 727 N.W.2d 144, 152-53 (Minn. Ct. App. 2007). In short, like the majority of jurisdictions across the country, all sources of law in Minnesota have rejected the existing Indian family exception.

B. Applying the "existing Indian family" exception would contradict ICWA's text, promote defiance of its provisions, and jeopardize Minnesota's progress.

Minnesota's rejection of the "existing Indian family" doctrine is consistent both with the text of ICWA and with its purpose of serving the best interests of Indian children while maintaining viable Indian tribes.

First, there is no provision of ICWA that limits its applicability to only Indian children with "existing Indian families." Moreover, as Respondent Birth Father explains, "the statutory language, structure, and background" preclude such an exception. F. Br. at 19; *see Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("In reading a statute we must not look merely to a particular clause, but consider in connection with it the whole statute." (internal quotation marks and citation omitted)). Congress itself rejected an earlier version of ICWA that would have sanctioned certain state-court decisions regarding tribal-court jurisdiction on whether an Indian child had "significant contacts" with his or her Indian tribe. Indian Child Welfare Act, Pub. L. No. 95-608, § 4(5), 92 Stat. 3069 (1978). Petitioners' "existing Indian family" exception would reintroduce this abandoned idea, and indeed would do so in an even broader manner than Congress contemplated by applying it to the entire statute.

Moreover, testimony surrounding ICWA's passage further reflected that *every* Indian child *has* an existing Indian family at birth – a fact to which state caseworkers applying "a white, middle-class standard" were blind. *See Holyfield*, 490 U.S. at 37 (quoting House Report, at 24). So today, a court looking for a Norman Rockwell-style portrait of a nuclear "existing Indian family" may not find one, but Congress already dismissed such myopic judgment. This Court should not adopt a judicial work-around that relies on the very idea Congress rejected. *See* Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069.

Indeed, the circumstances parties have used to argue for the "exception" usually arise only where (as in this case) compliance with ICWA's procedures has been delayed and the Indian child has been deprived of his or her familial and tribal connections. If ICWA is followed from the beginning of each case, any arguable policy justification for an "existing Indian family exception" disappears. *E.g.*, Benchbook, at 35-17 ("It is paramount that the Indian child's parent or Indian custodian and child's tribe be immediately notified of the placement proceeding and of the pending hearing."). And if litigants expect that courts will follow ICWA from the beginning of each case, as Minnesota courts have learned to do, delay and uncertainty in permanent placement decisions (as demonstrated by this case) will be avoided.

C. Petitioners' proposed revisions to ICWA invite constitutional challenges that Minnesota has avoided.

Finally, Petitioners' arguments about impermissible racial classifications are entirely backward. Congress's decision to ground ICWA's applicability on the statutory definition of an "Indian child" is constitutionally sound because it rests on sovereign tribal-membership decisions. The definition is not "triggered by the child's racial status unmoored to tribal sovereignty, culture, or politics," as Petitioners argue. Pet. Br. at 18. ICWA's protections of Indian children are "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities[.]" *See Morton v. Mancari*, 417 U.S. 535, 554 (1974).

This Court has recognized the authority of Indian tribes to determine their membership, *Santa Clara Pueblo*, 436 U.S. at 55 (citing *Roff v. Burney*, 168 U.S. 218 (1897)), and in Minnesota, those decisions may include a residency requirement instead of a blood-quantum requirement. *E.g.*, Const. of the Lower Sioux Indian Cmty. in Minn., art. III, § 1 (extending membership to "All children of any member who is a resident of the Lower Sioux Reservation at the time of the birth of said children."), *available at* http://www.lowersioux.com/pdffiles/Lower%20Sioux%20Indian%20Community%20Constitution.pdf. Minnesota law affords ICWA's procedural protections to *all* parents of Indian children – not just Indian parents –

and so has no disparate racial treatment. *See* 25 U.S.C. § 1903(9) (defining parent as "any biological parent or parents of an Indian child"); Minn. Stat. § 260.755, subd. 14.

By contrast, any adjudication of whether a child is part of an "existing Indian family" is fraught with constitutional problems. The existing Indian family exception requires courts to "judge whether the parent's cultural background meets [the dominant society's] view of what 'Indian culture' should be." *See In re D.A.C.*, 933 P.2d 993, 999 (Utah Ct. App. 1997); *In re A.J.S.*, 204 P.3d 543, 551 (Kan. 2009); *see also In the Matter of Baby Boy C.*, 27 A.D.3d 34 (N.Y. App. Div. 2005). Instead of letting tribes be the judge of who is "Indian," the existing Indian family exception asks courts to decide, case by case, whether the child was in a home "Indian enough" for ICWA to apply. *See, e.g.*, Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 Am. Indian L. Rev. 1, 40-41 (1998) (describing court inquiries into "a number of intrusive and, for some tribes, irrelevant factors" including whether parents voted in tribal elections, subscribed to tribal newspapers, and contributed to Indian charities). Unmoored to tribal membership criteria, state courts applying the "exception" to avoid ICWA can do so only by relying on impermissible racial and ethnic classifications. *See In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *4 (Tenn. Ct. App.

Apr. 27, 2009) (attempting to judge whether an Indian child "was in a home or part of a family that recognized its Native American culture").

Federal and state courts should not be in the business of counting dream catchers or pow-wows, and Minnesota's decision to avoid such inquiries is the constitutionally sound majority approach that this Court should adopt. *See Machinists v. Street*, 367 U.S. 740, 749 (1961) (describing doctrine of statutory interpretation that requires federal statutes to be construed to avoid "serious doubt of their constitutionality").

IV. The minimum federal protections of ICWA remain important to Indian children and Indian tribes in Minnesota and should be followed.

ICWA's protections remain as necessary today as when Congress passed the statute. While tribes, states, and local governments have made undeniable progress toward the Congressional goal of protecting Indian children's connections to their tribes, there is still work to be done. *Holyfield*, 490 U.S. at 37 (citing House Report, at 23). This Court should not undo the progress that Minnesota has achieved – and prevent it from improving further – by accepting Petitioners' invitation to change the governing law.

A. Adherence to the letter and spirit of ICWA is needed to further reduce disparities.

Recent studies done on child protective actions in Minnesota present a stark picture of the additional work that is needed to achieve greater stability in maintaining connections between Indian children, their families, and their tribes. A report published by the Minnesota Department of Human Services in February of 2010 acknowledged that "American Indian children were placed in out-of-home care for one or more days in 2008 at a rate more than twice that of any other group and were 12 times more likely than a White child to spend time in placement." Minn. Dep't of Human Services, *Minnesota Child Welfare Disparities Report*, at 21, *available at* https://edocs.dhs.state.mn.us/lfserver/Public/DHS-6056-ENG. A 2007 publication by the Minnesota Department of Human Services revealed similar disparities. Minn. Dep't of Human Services, *Indian Child Welfare Act (ICWA) Active Efforts Best Practices*, at 5 (Feb. 2009), *available at* http://www.mncourts.gov/Documents/0/Public/Childrens_Justice_Initiative/ICWA_-_Active_Efforts_Best_Practices_%28MN_DHS%29_%28February_2009%29.pdf.

The detailed 2010 report provides data and research that demonstrates that a child being Indian is a relevant factor in the disparities that exist in Minnesota. Those disparities exist independent of factors including maltreatment occurrence rates and poverty.

Id. at 9-10. For example, the report admits that "tribally affiliated children are disproportionately referred by community reporters" and that "[n]ational and local research indicates that some disproportionate representation may be due to factors other than true differences in maltreatment occurrence." *Id.* It also compares relevant factors across demographic groups; the data demonstrates that American Indian children still have higher out-of-home placements than their African-American counterparts, even despite higher rates of poverty in the African-American families. *Id.* at 10, 21.

B. Changing ICWA as requested by Petitioners would disturb Minnesota's progress.

ICWA, this Court's decision in *Holyfield*, and the state law in Minnesota all demonstrate that applying the provisions of ICWA to child custody proceedings involving Indian children promotes the best interests of those children. 25 U.S.C. § 1902; *Holyfield*, 490 U.S. at 50 n.24; 2007 Agreement, at 2. The necessary corollary is that the opposite result – urged by Petitioners and the *amici* supporting their position – is contrary to the best interests of Indian children.

Petitioners' disappointment with a South Carolina decision in a particular case does not demonstrate *a minore ad maius* a problem with ICWA. Yes, there

is more work to be done in Minnesota to rectify the disparate treatment of Indian children in child-custody proceedings. But as the last three-and-a-half decades in Minnesota have demonstrated, that work is best undertaken within a predictable framework that fosters coordination and cooperation. Even in Minnesota, where the state, tribes, and local governments have built on ICWA's framework by implementing statutes, intergovernmental agreements, and tools for the judiciary, the need for ICWA and its protections remains. Each of these vital pieces rests on ICWA's core protections of the interests of Indian children and tribes.

Today, with the ICWA framework in place and Minnesota's implementation continuing, the experience of Indian children in Minnesota is changing. But centuries of institutionalized assault on Indian families cannot be remedied in three-and-a-half decades. Every day, tribal agencies work side-by-side with their state counterparts doing the hard work of keeping kids safe, fostering their development, and placing them with families that will continue to nurture their intellects, abilities, and identities. Consistent with ICWA, every day that they do so, their guiding star is the best interests of each individual child. ICWA ensures that these workers look for these best interests using a lens that understands that "[r]emoval of Indian children from their cultural setting seriously impacts long-term tribal survival and has

damaging social and psychological impact on many individual Indian children." *Holyfield*, 490 U.S. at 50 (quoting House Report, at 52).

Though it has taken years to refine these practices on the ground, they are now familiar in Minnesota. By providing procedural certainty to case managers, guardians ad litem, and others, the ICWA framework allows these workers – with both tribal and nontribal perspectives – to focus on the substance of what is best for particular children in particular cases instead of devoting resources to jurisdictional battles. This system is predicated on ICWA remaining in place, with full effect to all its provisions. In Minnesota, ICWA works because everyone knows the rules.

A reversal of the South Carolina Supreme Court's ruling here would change the rules in Minnesota. Accepting Petitioners' invitation to read state-law paternity standards into ICWA or to impose the "existing Indian family" exception would undermine Congress's express purpose "to protect the rights of the Indian child as an Indian and the rights of the Indian Community and tribe in retaining its children in its society." *Id.* at 37 (quoting House Report, at 23). Such a decision would also upset settled expectations in the states, frustrating the progress that ICWA has prompted thus far. Introducing state-law triggers into the application of ICWA would upset Minnesota's careful twelve-government balance of interests in the 2007 Agreement. 2007 Agreement, at

Part I § F(21). And instead of allowing caseworkers to focus on what is best for Indian children, the "existing Indian family" departure would create a case-by-case carve-out that encourages bitter litigation about which sovereign has jurisdiction and even more fundamentally about what it means to be Indian, a result that does violence to ICWA's purpose. Senate Report, at 23 (stating that ICWA addresses "[t]he need to resolve jurisdictional confusion on terms that will eliminate both the most serious gaps in service and the conflicts between State, Federal, and tribal governments that leave too many children without needed care").

Reversal here would send states like Minnesota back to square one and would once again force tribes to try to persuade state and local caseworkers of the importance of tribal connections to both children and tribes, a process that Congress recognized failed tribes and Indian children dreadfully in the past.

CONCLUSION

"The right of Indian tribes and Indian families to their children is a human right and the defense of human rights, like charity, begins at home." 124 Cong. Rec. 38103. At home in Minnesota, ICWA has formed the foundation of the work to defend the right of Indian tribes and Indian families to their children.

This Court should protect that framework by affirming the South Carolina Supreme Court's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, a minor child under the age of fourteen years, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF OF *AMICI CURIAE* MINNESOTA DEPARTMENT OF HUMAN SERVICES AND MINNESOTA OMBUDSPERSON FOR AMERICAN INDIAN FAMILIES IN SUPPORT OF RESPONDENTS BIRTH FATHER AND CHEROKEE NATION

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Minnesota Department of Human Services (DHS) is the largest state agency in Minnesota and has a significant impact on the lives of children in Minnesota. It supports and protects the welfare of children of the State through a comprehensive and coordinated program of public child welfare services. DHS administers child protection, foster care, and adoption through its Children and Family Services division. The agency also supervises the 87 counties in Minnesota that provide direct services to children and families. DHS is responsible for ensuring that Minnesota children involved in child custody proceedings benefit from all available legal protections and that they and their families receive support and social services to meet their individual needs.

DHS is also actively engaged in developing policies to improve and implement practices to meet the unique needs of Indian children and families. The agency has

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[1] Pursuant to Supreme Court Rule 37.3(a) all parties have filed blanket consents to the filing of amicus briefs in this case. *See* correspondence from counsel for Petitioners and Guardian ad Litem of Baby Girl, filed with the Court on February 11, 2013; correspondence from counsel for respondents Birth Father and Cherokee Nation, filed with the Court on February 19, 2013. Pursuant to Supreme Court Rule 37.6, DHS and the Ombudsperson state that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than DHS and the Ombudsperson and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

collaborated with each of the eleven tribes located in Minnesota to develop a tribal-state agreement, which encourages the tribes' participation in child custody proceedings involving Indian children.

The Minnesota Ombudsperson for American Indian Families (Ombudsperson) is an independent agency created by the Minnesota Legislature in 1991 to ensure that agency decisions, rules, procedures, or other forms of policy and decision-making processes affecting Indian children in Minnesota are in compliance with federal and state laws. *See* Minn. Stat. § 257.0755, *et seq.* (establishing Ombudsperson for Families for the Indian Affairs Council). The Ombudsperson monitors agency compliance with child welfare laws impacting the placement of Indian children, assists with resolving problems involving social service agencies and officials, and investigates complaints of unfair treatment by Indian community members.

DHS and the Ombudsperson have a significant interest in this case because the questions presented directly affect the rights of Indian children and families as well as DHS' current efforts to implement ICWA through collaboration with tribes in Minnesota. DHS and the Ombudsperson submit this amicus brief to inform the Court of their experience in Minnesota relating to application of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901, *et seq.*

SUMMARY OF THE ARGUMENT

ICWA granted the states authority to enact standards providing greater protections than ICWA and authorizes states to enter into agreements with

tribes concerning care and custody of Indian children and jurisdiction over child custody proceedings. Pursuant to this authority, Minnesota has enacted several laws, and DHS has entered into a tribal-state agreement with eleven tribes in Minnesota, that expand ICWA's protections. The Court should be cognizant of individual state developments as they relate to ensuring the best interests of Indian children and craft its decision so as not to frustrate Minnesota in this regard.

ARGUMENT

I. THE INDIAN CHILD WELFARE ACT.

A. Background.

ICWA was enacted in 1978 as a result of what hearing testimony characterized as "[t]he wholesale removal of Indian children from their homes" through voluntary and involuntary adoption and foster care placement. *See* Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (1974) (statement of William Byler) (hereinafter 1974 Hearings). ICWA was motivated by concerns that many Indian children were taken away from their families based on various discriminatory practices of welfare officials. *Id.* at 5.

Testimony indicated that what social workers commonly determined to be child neglect, *i.e.* leaving children with adults outside of the nuclear family, was in fact a misunderstanding of the dynamics of extended family in child-rearing, *id.* at 18, and that social

workers also often misinterpreted Indian parents' reliance on a state agency for temporary care of their children as a lack of concern. *Id.* at 19. According to hearings, exacerbating this problem was the fact that most Indian children and families lacked adequate access to legal representation in child custody cases or simply had no "idea of what kind of legal recourse...[was] available to them." 1974 Hearings, 5.

Testimony further indicated that not only were a disproportionate number of Indian children placed in foster care, but almost 85 percent of those children were placed in non-Indian homes. 1974 Hearings, 5. As stated in one of the committee hearings:

> Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.

Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 191-92 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians) (hereinafter 1978 Hearings). Scholarly journals report that these policies were viewed by many as "reflect[ing] a determined effort to reshape the

Native American family into the nineteenth-century Anglo-American model." Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 Ark. L. Rev. 327, 329 (1986).

Committee testimony stated that "[c]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people." 1978 Hearings, 193. Testimony also addressed tribal sovereignty and self-determination: "[f]urthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships." *Id.*

B. The Federal Government's Goal Of Protecting American Indian Children, Families, And Tribes.

Section 1901 reflects the legislative goals of ICWA:

> the Congress finds....
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

Indian Child Welfare Act, 25 U.S.C. § 1901 (2012).

Recognizing that "for decades Indian parents and their children [had] been at the mercy of arbitrary or abusive action of local, State, Federal, and private agency officials," Congress established minimum federal procedural and substantive standards for the removal of Indian children from their families. *See* 1974 Hearings, 1; 25 U.S.C. § 1901, *et seq*. ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report, at 23, U.S.Code Cong. & Admin. News 1978, at 7546.

II. INDIAN CHILD WELFARE IN MINNESOTA.

A. Background.

ICWA provides minimum federal standards and recognizes the states' authority to enact legislation that provides higher standards for the protection of Indian children and families involved in child custody proceedings. *See* 25 U.S.C. § 1921 (2012). It also grants states and tribes the authority to enter into agreements concerning the care and custody of Indian children and jurisdiction over child custody cases. *See* 25 U.S.C. § 1919(a) (2012). At the time ICWA was debated, "one in eight Indian children under the age of 18 was in an adoptive home" in Minnesota, and "during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1989). The adoption rate for Indian children in Minnesota was "eight times that of non-Indian children" and "approximately 90% of the Indian placements were in non-Indian homes." *Id.*; *see also* 1974 Hearings, 5. To address these concerns, Minnesota enacted several pieces of legislation to complement and extend the protections provided by ICWA.

B. The Minnesota Minority Child Heritage Protection Act.

Shortly after passage of ICWA, the Minnesota Legislature enacted legislation requiring child welfare officials to consider ethnic and racial identity in out-of-home placements of children of color. *See* Laws of

Minnesota 1983, chapter 278. This law, known as the Minnesota Minority Child Heritage Protection Act (MMCHPA), established the foster care and adoption policy concerning the placement of children of color. *Id.* MMCHPA provided placement preferences similar to those under ICWA. It required child placement agencies, in evaluating the child's best interests, to consider the child's ethnic heritage in making a family foster care placement. *Id.* Additionally, MMCHPA directed welfare agencies to recruit foster families from among the child's relatives and families of the same ethnic heritage. *Id.* MMCHPA was later repealed. *See* 1999 Minn. Laws, ch. 139, art. 4, sec. 3.

C. The Minnesota Indian Family Preservation Act.

While Minnesota was the first state to adopt legislation requiring consideration of a child's ethnic and racial identity in foster care and adoptive placements, it struggled with issues concerning placement of Indian children. Resources on Minnesota Issues, *Minnesota Minority Child Heritage Protection Act*, March 2012, http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=mmchpa; Kathryn A. Carver, *The 1985 Minnesota Indian Preservation Act: Claiming a Cultural Identity*, 4 Law & Ineq. 327, 329 (1986). ICWA was viewed by some to have inadequately dealt with voluntary foster care and adoptive placements. *Id.* at 337.

To address this concern, legislation was proposed in Minnesota to expand ICWA's protections to voluntary foster care, pre-adoptive, and adoptive placements. *Id.* at 338-40. Although the bill was initially defeated due

to concerns about some of the requirements concerning adoption matters, legislation was proposed again in 1985, this time focusing primarily on voluntary foster care placements. *Id.* at 340-46. The new law, known as the Minnesota Indian Family Preservation Act (MIFPA), established ICWA as state law and expanded several protections provided under ICWA.

For example, MIFPA mandates that tribes receive notice of foster care placements involving Indian children, whether voluntary or involuntary. *See* Minn. Stat. §§ 260.761, 260.765 (2012). Moreover, the law requires child welfare agencies to notify the child's tribe when there is a *potential* for out-of-home placement. Minn. Stat. § 260.761, subd. 2. The effect of these provisions "is to ensure tribal involvement before the decision is made to place the child out of the home" and "prevent culturally biased removals and work toward keeping the Indian family together." Carver, *supra*, at 345.

In 1987, MIFPA was amended to authorize grants to Indian tribes, organizations, and social service agencies for the provision of Indian child welfare services. *See* 1987 Minn. Laws ch. 403, art. 2, secs. 110-127. The 1987 amendments also gave the Commissioner of DHS the authority to enter into agreements with tribes regarding jurisdiction of child custody cases involving Indian children. *See* 1987 Minn. Laws, ch. 403, art. 2, sec. 118; *see also* 25 U.S.C. § 1919(a).

In 2007, MIFPA was amended again, in part, to address the so-called "existing Indian family

exception."[2] The amendment provided, in part, as follows:

> A court shall not determine the applicability of [MIFPA] or the federal Indian Child Welfare Act to a child custody proceeding based upon whether an Indian child is part of an existing Indian family or based upon the level of contact a child has with the child's Indian tribe,

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[2] The "existing Indian family exception" (EIFE) is a doctrine under which state courts will not apply ICWA to children who otherwise qualify as Indian under ICWA if neither the child nor the child's parents have a relationship with the tribe. Other states have also rejected the EIFE. *See* Iowa Code Ann. § 232B.5(2); Wis. Stat. Ann. § 938.028(3)(a); *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989); *Michael J. Jr. v. Michael J. Sr.*, 7 P.3d 960, 963-64 (Ariz. Ct. App. 2000); *In re N.B.*, 199 P.3d 16, 21 (Colo. App. 2007); *In re Baby Boy Doe*, 849 P.2d 925, 931-32 (Idaho 1993); *In re Adoption of S.S.*, 622 N.E.2d 832, 839 (Ill. App. 1993) (rev'd on other grounds by *Adoption of S.S.* [*S.S. II*], 657 N.E.2d 935 (Ill. 1995)); *In re Elliott*, 554 N.W.2d 32, 35 (Mich. Ct. App. 1996); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925, 932-33 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313, 322-23 (N.Y. App. Div. 2005); *In re A.B.*, 663 N.W.2d 625, 636 (N.D. 2003); *Quinn v. Walters* [*Quinn I*], 845 P.2d 206, 208-09 (Or. Ct. App. 1993) (rev'd on other grounds by *Quinn v. Walters* [*Quinn II*], 881 P.2d 795 (Or. 1994)); *D.J.C. v. P.D.C.*, 933 P.2d 993, 999 (Utah Ct. App. 1997). Some states, though, have adopted the exception. *See, e.g.*, *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990); *In re T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257, 262 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995); *In re S.A.M.*, 703 S.W.2d 603, 609 (Mo. Ct. App. 1986); *In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009); *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *5 (Tenn. Ct. App. Apr. 27, 2009).

> reservation, society, or off-reservation community.

Minn. Stat. § 260.771, subd. 2 (2012).

D. 1989 "Reasonable Efforts" Legislation.

The Minnesota Legislature also passed the "Reasonable Efforts" law in 1989. The legislation "incorporates into state law additional portions of ICWA not considered by the [Minnesota] Indian Family Preservation Act." Peter W. Gorman & Michelle Therese Paquin, *A Minnesota Lawyer's Guide to the Indian Child Welfare Act*, 10 Law & Ineq. 311, 320 (1992). It requires, in part, that a court ensure reasonable efforts, "including culturally appropriate services . . . are made to prevent placement or to eliminate the need for removal and to reunite the child with the child's family at the earliest possible time. . . ." Minn. Stat. § 260.012(a) (2012). In child custody cases involving Indian children, the statute requires trial court judges to make findings and conclusions consistent with ICWA's provision for active efforts. Minn. Stat. § 260.012(c).

E. Minnesota's Tribal State Agreement.

Section 1919 of ICWA authorizes states and tribes to enter into agreements respecting the care and custody of Indian children and jurisdiction over child custody agreements. 25 U.S.C. § 1919(a). MIFPA incorporates this provision into Minnesota state law, giving the Commissioner of DHS ("Commissioner") the authority to enter into such agreements on behalf of the State of Minnesota. *See* Minn. Stat. § 260.771,

subd. 5 (2012). The Commissioner has twice entered into such agreements with the tribes located within Minnesota—first in 1998, and more recently in 2007.

Like its predecessor, the 2007 Tribal-State Agreement (TSA) was developed to "protect the long term best interests, as defined by the tribes, of Indian children and their families, by maintaining the integrity of the Tribal family, extended family and the child's Tribal relationship." Minn. Dep't of Human Serv., 2007 Tribal/State Agreement, 2 (2007), https://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5022-ENG) (hereinafter 2007 Tribal/State Agreement). The Commissioner and the Minnesota tribes intended the agreement "to strengthen implementation of the letter, spirit and intent of [ICWA] and [MIFPA]" and "to coordinate the abilities and to maximize the guidance, resources and participation of tribes in order to remove barriers from the process that impede the proper care of Indian children." *Id.* at 2-3.

Collaborative efforts of DHS and the tribes are demonstrated in several provisions of the TSA. For example, DHS has agreed to establish and maintain one or more positions within DHS filled by an individual with knowledge of and experience with Indian child welfare and tribal identities in Minnesota. 2007 Tribal/State Agreement, 24. These individuals are charged with, among other things, "strengthening and monitoring services to Indian children and families provided by local social service agencies and private child placement agencies. . . ." *Id.* The TSA's resolution process is another example of cooperation between DHS, the Ombudsperson, and the tribes. Under this process, a joint DHS/tribal committee

receives, documents, investigates, and works to resolve issues of non-compliance or problems that affect how tribal families receive services. *Id.* at 25-26. DHS and Minnesota tribes have also partnered to develop a plan to recruit Indian foster and adoptive homes. *Id.* at 32. DHS and the tribes also collaborate to provide training to assist potential Indian foster care providers in complying with tribal or state licensing standards. *Id.*

III. DHS AND THE OMBUDSPERSON ENCOURAGE THE COURT TO INTERPRET ICWA TO CONTINUE TO ALLOW MINNESOTA AGENCIES THE AUTHORITY TO EFFECTUATE ICWA'S GOALS.

DHS and the Ombudsperson believe the implementation of ICWA depends largely on the willingness of states and tribes to work collaboratively to further the best interests of Indian children. They believe the outcome of this case could redefine how states and tribes can work together on issues of child welfare concerning Indian children and ask this Court to carefully interpret ICWA to ensure that they continue to have authority under ICWA regarding Indian child welfare. ICWA recognizes that states in some instances will provide higher standards to protect the rights of Indian children and families, and DHS and the Ombudsperson believe that complementary state policies, legislation, and programming allow Indian children to receive services tailored to meet their individual needs. In short, DHS and the Ombudsperson believe that the decision in this case should reflect consideration of Minnesota's interest in

having the ability to retain authority in implementing the protections afforded under ICWA.

CONCLUSION

DHS and the Ombudsperson have a sincere interest in upholding the intent and responsibility of ICWA for the benefit of all Minnesotans. They respectfully request that the Court interpret ICWA to continue to allow Minnesota agencies the authority to effectuate ICWA's goals.

Respectfully Submitted,

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Dated: March 28, 2013

AMICUS CURIAE BRIEF

No. 12-399

IN THE

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF OF *AMICI CURIAE* NATIONAL COUNCIL FOR ADOPTION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901-63, applies to state custody proceedings involving an Indian child. A dozen state courts of last resort are openly and intractably divided on two critical questions involving the administration of ICWA in thousands of custody disputes each year:

1. Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law.

2. Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.

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INTEREST OF *AMICUS CURIAE* [1]

The National Council For Adoption (NCFA), founded in 1980 is an adoption advocacy nonprofit that promotes a culture of adoption through education, research, and legislative action. NCFA is an authoritative voice for adoption, passionately committed to the belief that every child deserves to thrive in a nurturing, permanent family. We serve children, birthparents, adoptive families, adult adoptees, adoption agencies, adoption professionals, U.S. and foreign governments, policy makers, media, and the general public as the authoritative voice for adoption throughout the United States. NCFA has over 30 years of experience providing guidance, educating on best practices, and serving many thousands of children and families. With regards to domestic infant adoption, NCFA is especially knowledgeable as the only source that continues to count domestic adoptions on the national level. Further, since 2001 NCFA has trained more than 20,000 on how to properly counsel expectant parents on the option of adoption and created a curriculum many use to educate their communities on this issue. As a leading voice on adoption, NCFA believes its special expertise and experience regarding adoption laws, practices, and outcomes place it in a special position to inform the Court about the importance of the concerns in this case, including the need for laws that allow

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

individual children's best interests to be pursued and the need for practitioners to have a clear understanding of when, how, and to whom to apply the Indian Child Welfare Act.

SUMMARY OF ARGUMENT

All children, including those subject to the Indian Child Welfare Act, require legal systems and practices that can serve the best interests of that particular child and help ensure their right to a permanent, loving family. In order to ensure child welfare practitioners and other participants in the adoption process are able to pursue the best interests of every child, they must have guidance on when, how, and to whom to apply the Indian Child Welfare Act. Children, biological and adoptive parents, and others impacted by adoption must be advised by practitioners on reasonable expectations of outcomes for a child in order to provide adequate, nurturing care to a child.

ICWA's implementation has been varied amongst states and tribes. Specifically, there is not a clear national understanding of whether ICWA applies when a Non-Indian parent voluntarily places a child for adoption and there is not a clear understanding of the definition of parent under ICWA with respect to unwed fathers. State courts' varied implementations of ICWA make its meaning unclear and make it difficult for practitioners to know how to properly implement and educate all those involved in and impacted by the adoption process. When this particular law's meaning is unclear, outcomes for children become unstable and unpredictable, putting at risk a child's right to permanent, loving family that can provide developmentally necessary healthy attachment through consistent caretakers. National Council

For Adoption advocates that when answering the two questions presented in this case the court should determine what is developmentally necessary for a child to succeed in life, what rights a child has to a successful future, and whether the Indian Child Welfare Act as it is currently put into practice is capable of allowing a child's best interests and their opportunity for a successful future to be pursued.

ARGUMENT

I. EVERY CHILD SHOULD HAVE THE RIGHT TO A DECISION MADE IN THE BEST INTERESTS OF THAT PARTICULAR CHILD

Although historically, children's rights were often couched in terms of parental rights, it can be reasonably presumed that the right to grow up safe, provided for, and cared for could reasonably considered among the rights of life and liberty that belong to any American. *See e.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944). In the United States, acting in the "best interest of the child" is a universally accepted state standard when determining child custody decisions, including decisions regarding placing a child in a family for adoption. This standard dates back hundreds of years and is undisputed in its usefulness in pursuing the liberty interests of a child to the safety, healthy, and appropriate development that comes within consistent and appropriate care. This universally accepted standard should always be the ruling priority by any court deciding a child's placement outcome.

A variety of factors may be considered in weighing the best interests of a child. State courts may

list suggested interests for consideration differently, but they consistently consider elements regarding a child's safety, physical health, and appropriate physical, mental, and social development. Every child deserves decisions made in their particular interests. Very reasonable and effective standards are typically used to determine whether a child has been or will be able to thrive in an environment. The safety of the environment, the health of the child, the ability of caretakers to provide for and be physically and emotionally available are all excellent indicators of whether a home will be best for a child. Further indicators might include finding a family of similar race, cultural experiences, or even the urban or suburban environment a child is accustomed to. While all these and many other variables ought to be reviewed it is important that these interests always be reviewed through the lens of that particular child's needs and experiences.

Baby Girl and all children have a right to parents who will act on their behalf. In order to be considered a parent with legal protection, a parent must fulfill their obligation to act on a child's behalf. "Parents who faithfully discharge their parental obligations with assiduity and to the full extent of their means and abilities are entitled to the custody of their children. Parental rights, however, are not absolute and are not to be unduly exalted and enforced to the detriment of the child's welfare and happiness. The right of parentage is not an absolute right of property, but is in the nature of a trust reposed in them, and is subject to their correlative duty to protect and care for the child. The law secures their parental right only so long as they shall promptly recognize and discharge their corresponding obligations. As the child owes allegiance to the government of the

country of its birth, it is entitled to the protection of that government, which, as *parens patriae*, must consult its welfare, comfort, and interests in regulating its custody during its minority." *In re Adoption of Anderson*, 235 Minn. 192, 200 (Minn. 1951) (citing *Purinton v. Jamrock*, 195 Mass. 187, 80 N.E. 802, 18 L.R.A. (n.S.) 926).

Because parental rights are secured only so long as a parent fulfills the obligation of the trust relationship between the parent and the child and because both a parent and the government have an obligation to protect a child's welfare, comfort, and interest during the time of a child's minority, the legislature has implemented certain mandates, including those mandates reflected in the ICWA. 25 U.S.C. § 1901. The ICWA limits application by defining "Indian child" as any unmarried minor who either is a member of an Indian tribe or "is the biological child of a member of an Indian tribe" and "eligible for membership". *Id.* § 1903(4). The ICWA further limits the term "parent" as "any biological parent or parents of an Indian child," but specifically excludes "the unwed father where paternity has not been acknowledged or established." *Id.* § 1903(9). Consistent, with the law protecting the best interests of all children, the ICWA recognizes that a biological father who does not "establish" or "acknowledge" paternity is not fulfilling their duty in trust to protect and care for the minor child and does not obtain protection of parental rights under law. Thus, if there is neither an "establishment" nor "acknowledgment" of paternity, an unwed father is excluded from application of the ICWA. *Id.* § 1903(9).

The ICWA does not set forth its own definition of "establish" or "acknowledge", rather, like in many

matters to pertaining to the family law, it is left to the individual states to determine the mechanism to "establish" or "acknowledge" paternity. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *In re Burris*, 136 U.S. 586, 593-94 (1890)). To establish has been defined under law to "make stable or firm; to fix in permanence and regularity; to settle or secure on a firm basis, to settle firmly or to fix unalterably." *Wells Lamont Corp. v. Bowles*, 149 F.2d 364, 266 (1945). Thus, to establish paternity is to have the parent-child relationship fixed unalterably under law, or to have a court order permanently recognizing the parent and child relationship, or to put simply, an adjudication of paternity. Here, there was no adjudication of paternity prior to the time biological father was mandated to act under South Carolina law.

The term "acknowledgement" or "acknowledgment of paternity" in the context of paternity is a term of art established by the Uniform Parentage Act of 1973. The Uniform Parentage Act, was adopted by many states, prior to the adoption of the ICWA. The Uniform Parentage Act of 1973, under the §4, proposed that states recognize a presumption of paternity under the following circumstances:

> [When] he acknowledges his paternity of the child in a writing filed with [the appropriate court or Vital Statistics Bureau]. If another man is presumed under this section to be the child's father, acknowledgement may be effected only with the written consent of the presumed father or after the presumption has been rebutted.

Uniform Parentage Act of 1973, §4. An acknowledgement of paternity, at that time created a presumption that an individual was the father, which protected his rights under law. While adoption of the Uniform

Parentage Act and the subsequent Uniform Parentage Act, was updated in 2000 and 2002 to reflect, among other suggestions, the federal law mandate that the states develop and utilize an "acknowledgment of paternity" to allow for the collection of child support for minor children. In 1996, pursuant to the Personal Opportunity and Work Responsibility Reconciliation Act, states were mandated to streamline the legal process for paternity establishment and required a state form for voluntary paternity acknowledgement. Under 42 U.S.C. 666(a)(5)(c)(iv) states are mandated to utilize a paternity acknowledgement form.

> Use of paternity acknowledgment affidavit. – Such procedures must require the State to develop and use an affidavit for the voluntary acknowledgment of paternity which includes the minimum requirements of the affidavit specified by the Secretary under section 452(a)(7) for the voluntary acknowledgment of paternity, and to give full faith and credit to such an affidavit signed in any other State according to its procedures.

42 U.S.C. 666(a)(5)(c)(iv). Thus, an "acknowledgment of paternity" remains a term of art in the context of establishing paternity.

South Carolina, in complying with the mandate under 42 U.S.C. 666(a)(5)(c)(iv) allows the parents to acknowledge paternity in a writing under certain and specific circumstances that acts as an adjudication under law. S.C. Code § 63-17-50. The acknowledgment of paternity creates a rebuttable presumption of the putative father's paternity except that a verified voluntary acknowledgment of paternity executed after January 1, 1998, creates a conclusive presump-

tion of the putative father's paternity subject to the provisions of Section 63-17-50. S.C. Code § 63-17-60 (a)(4).

In the present circumstances the South Carolina Supreme Court recognizes that the biological father did not either establish paternity under South Carolina law prior to the time he was mandated to act, or acknowledge paternity in a formal writing under S.C. Code § 63-17-50 prior to the time period in which he was mandated to act to create a presumption of paternity. However, the South Carolina Supreme Court determined that the ICWA "does not explicitly set forth a procedure for an unwed father to acknowledge or establish paternity," the birth father met the Act's definition of "parent" because he had "acknowledg[ed] his paternity through the pursuit of court proceedings as soon as he realized Baby Girl had been placed up for adoption and establish[ed] his paternity through DNA testing." Pet.App.21a-22a. The South Carolina Supreme Court erred in determining that the biological father "acknowledged" his paternity and his rights to parent a child that was unknown to him were legally protected by the ICWA by simply filing an untimely paternity proceeding without meeting the requirements under S.C. Code § 63-17-50.

In this case, and in the many thousands of child welfare cases that take place each year, many individuals are impacted by a child's placement. However, no individual is more impacted by this key decision than the minor child. The court's decision below overlooked the typically trusted best interests of the child standard allowing the ICWA to be improperly invoked solely based on genetic connection to a tribe, without an adjudication or acknowledge-

ment of paternity. Brief for Petitioner at 16, *Adoptive Couple v. Baby Girl*, No. 12. Baby Girl's 3/256 Cherokee blood connection to a tribe through the biology of a father who had not taken the legal steps necessary to protect his paternal rights, trumped the best interests of the minor child. This determination essentially ignores the rights and protections to which the minor child is entitled, exalts the rights of biology over the protections afforded the minor child under law and reduces the child to the chattel or property of a biological parent, as opposed to the beneficiary of a trust relationship between the parent and the minor child which is upheld so long as the biological parent fulfills his or her legal obligations. See, *In re Adoption of Anderson*, 235 Minn. 192, 200 (Minn. 1951) (citing *Purinton v. Jamrock*, 195 Mass. 187, 80 N.E. 802, 18 L.R.A. (n.S.) 926). The removal of Baby Girl's liberty interest based solely on race is a violation of equal protection.

It is "inherently unequal" to make separate considerations of what is in a child's best interest solely because of their race. *Brown v. Bd. Of Education*, 347 U.S. 483, 495 (1954). The 14th amendment serves, in part, to do away with prioritizing race in cases of child custody, because classifying persons according to their race was "more likely to reflect racial prejudice than legitimate public concerns." *Palmore v. Sidote*, 466 U.S. 429, 432, (1984), *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Furthermore, one cannot use culture as a proxy for race. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Here, the South Carolina Supreme

Court explicitly recognizes that the biological father would fail under South Carolina law, but for the minor child being eligible for enrollment in the tribe. Brief for Petitioner at 16, *Adoptive Couple v. Baby Girl*, No. 12. The determination is couched as one of alleged "political affiliation", rather than race. However, here, unlike *Holyfield*, the minor child has not resided on the reservation and has no connection to the tribe, except based upon an untimely determination of paternity. The child's only connection to the tribe is based upon a 3/256th blood quantum determined after the biological father's right to contest the adoption proceeding had extinguished. Thus, the biological father is allowed to "bootstrap" himself into a position to establish parental rights solely based upon the minor child's eligibility for enrollment in the tribe, which has no other connection, except one of race. Here, like *Cayetano*, the determination of rights are not based upon "political affiliation", but are solely and improperly based upon race.

To protect all minor children, the law should be clarified that state law pertaining to the "establishment" and "acknowledgment of paternity" must be followed, as the ICWA unequivocally and specifically excludes as a parent, "the unwed father where paternity has not been acknowledged or established." *Id.* § 1903(9). Where there has been an establishment of paternity or an "acknowledgment of paternity" under state law of an individual who otherwise qualifies as a parent under the ICWA of a child that qualifies as an Indian child under the ICWA, the legal protections afforded the biological father under the ICWA would apply. Without guidance on the definition of "acknowledgment" under the ICWA, proposed adoptive parents and biological mothers and fathers are left without the necessary clarity to understand their

rights, and most importantly, more minor children will be subject to the trauma of removal from a home where the child is securely attached. Without guidance the government fails to provide minor children with the "protection of that government, which, as *parens patriae*, must consult its welfare, comfort, and interests in regulating its custody during its minority." *Purinton v. Jamrock*, 195 Mass. 187, 80 N.E. 802, 18 L.R.A. (n.S.) 926.

II. CONTINUITY OF CARE IS ESSENTIAL TO A CHILD'S DEVELOPMENTAL NEEDS

The adoption community widely agrees that a child has a right to grow up in a loving, permanent family. *Mission*, NATIONAL COUNCIL FOR ADOPTION, https://www.adoptioncouncil.org/who-we-are/mission.html (last visited Oct. 15, 2012); *Mission & Values*, DAVE THOMAS FOUNDATION FOR ADOPTION, http://www.davethomasfoundation.org/who-we-are/mission-and-values/ (last visited Oct. 16, 2012); *Who We Are*, CONGRESSIONAL COALITION ON ADOPTION INSTITUTE, http://www.ccainstitute.org/who-we-are/aboutus.html (last visited Oct. 16, 2012); *The Joint Council Mission*, JOINT COUNCIL ON INTERNATIONAL CHILDREN'S SERVICES, http://www.jointcouncil.org/about/mission/ (last visited Feb. 20, 2013). The need for family continuity isn't just what feels right or what will be more comfortable for children though. It is a developmental necessity substantiated by extensive scientific evidence. Consistent caretakers are developmentally necessary and removal from a loving family can be detrimental to a child's whole development.

A child can develop an attachment relationship with any adult who on a continuing, day-to-day basis, through interaction, companionship, interplay, and

mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. Joseph Goldstein et al., BEYOND THE BEST INTERESTS OF THE CHILD 27 (2d ed. 1979), 98; *see also*, *From Neurons to Neighborhoods: The Science of Early Childhood Development*, NAT'L RESEARCH COUNCIL & INST. OF MEDICINE 234 (Jack P. Shonkoff & Deborah A. Phillips, Eds., 2000) ("[The c]riteria for identification of attachment figures . . . [include] provision of physical and emotional care, continuity or consistency in the child's life, and emotional investment in the child."). Furthermore, it has been found to be the *quality* and *nature* of the interaction between parent and child, rather than any biological or legal connection, that creates and sustains these attachment relationships. Ana H. Marty, et al., *Supporting Secure Parent-Child Attachments: The Role of the Non-Parental Caregiver*, 175 EARLY CHILD DEV. & CARE 271, 273 (2005).

Attachment with familiar, trusted adults is necessary to healthy, holistic development. Early childhood development, and more specifically healthy brain development, relies heavily on child and caretaker relationships. Regular exchange in relationship between young children and trusted caretakers is fundamental to the wiring of the brain. *Three Core Concepts in Early Development: Serve & Return Interaction Shapes Brain Circuitry*, CENTER ON THE DEVELOPING CHILD HARVARD UNIVERSITY, http://developingchild.harvard.edu/index.php?cID=429 (last visited Oct. 15, 2012). Removal from safe and trusted caretakers can slow development and cause negative physical impacts common to trauma and can lead to toxic stress in a child. *Three Core Concepts in Early Development: Toxic Stress Derails Healthy Development*, CENTER ON THE DEVELOPING CHILD HARVARD

UNIVERSITY, http://developingchild.harvard.edu/resources/multimedia/videos/three_core_concepts/toxic_stress/ (last visited Oct. 15, 2012). While immediate action can generally be taken to respond to concerns of safety or provision for a child's needs, the trauma of breaking a secure attachment is not so quickly repaired and the normal brain development that ought to take place at the age the trauma is incurred can often be delayed or never reach its full potential. This is particularly true during years of early development when the brain is still developing. Physical health, cognition, social skills, and emotional competence can all face long term detriment when attachment is broken down and the secure, trusted caretaker is no longer present to model skills and behaviors which are mirrored by the child.

In this case, the secure attachment of 27 month old Baby Girl to Adoptive Parents was broken to return her to her biological father who had rejected her before birth and failed to show interest in her until past the period the state would generally consider him a legal parent, in large part because a child needs the safety, security, and developmental support he had failed to provide. However, ICWA was interpreted here to trump the child's needs for continued secure attachment. Instead of supporting continued positive development, a traumatic removal took place at a key developmental age for Baby Girl. When Congress enacted ICWA, their intent was to support tribal sovereignty and connection by helping ensure children weren't removed from what was familiar to them and when removal was necessary it was to a similar environment. Instead, ICWA is implemented in some cases to traumatize children by forcing them into completely unknown environments, traumatizing them by removal from the only family

they'd ever felt a connection with and imposing the developmental delays that come with the traumatic removal from a secure attachment.

III. THE INDIAN CHILD WELFARE ACT SHOULD NOT DISPLACE THE BEST INTERESTS OF THE CHILD

Despite Congress's declaration that "it is the policy of this Nation to protect the best interests of Indian children," its passage of ICWA has, instead, caused the [subjugation] of the best interests of the child in favor of the tribe. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1902. The "best interests of the child" standard has been the cornerstone of child custody issues and allows judges to examine and balance a number of factors to ensure that placement is in the best interests of the child.

In disrupted adoption cases, attachment between the child and adoptive parents is one factor courts typically heavily emphasize. The significance of attachment on the neurological and cognitive development of a child has been scientifically proven and many courts evaluate the attachment between a child and caregiver to reach a decision that is in the best interests of the child. *See, e.g.*, In re C.A.B., 4 A.3d 890 (D.C. Ct. App. 2010) (discussing the attachment between a child and foster parents during the best interests of the child evaluation).

Despite the scientific evidence proving the necessity of attachment for child development and, it's importance in determining whether placement is in the best interests of the child, ICWA at times allows the interests of the tribe to trump the best interest of the child. In application, ICWA can permit the rejection of adoption petitions in cases that would nor-

mally be approved simply because a child is eligible for membership in a tribe. Indian Child Welfare Act of 1978, 25 U.S.C § 1903.

In this case, the South Carolina Supreme Court admitted that under state law Father's consent to the adoption was unnecessary and, under normal circumstances, the adoption would have been approved, guaranteeing Baby's Girl permanency with her adoptive parents. Brief for Petitioner at 16, *Adoptive Couple v. Baby Girl*, No. 12. But, because Baby Girl is eligible for tribal membership and is the biological daughter of a member of the Tribe, the lower court deviated from the traditional state standards considered to be in the best interests of the child.

Permitting the rights of the tribe to trump the best interests of the child is often explained in terms of the tribal identity. Native Americans argue that a child's identity is linked to the broader sense of belonging to the "whole." Barbara Ann Atwood, *Children, Tribes and States: Adoption and Custody Conflicts Over American Indian Children* 238-239 (2010). Instead of focusing on the Anglo-American preference for individualism, Native Americans are taught from an early age that tribal survival is paramount. Barbara Ann Atwood, *Children, Tribes and States: Adoption and Custody Conflicts Over American Indian Children* 238-239 (2010). As a result, attachment theory, which focuses on the individual relationship between the child and caretaker, is deemed inapplicable to Indian children. Barbara Ann Atwood, *Children, Tribes and States: Adoption and Custody Conflicts Over American Indian Children* 239 (2010). In other words, membership in the collective replaces the need for emotional attachment between a child and caretaker. This view was bol-

stered by the Montana Supreme Court, which stated that "ICWA expresses the presumption that it is in an Indian child's best interests to be placed in accordance with the statutory preferences. To allow emotional bonding—a normal and desirable outcome...—to constitute an 'extraordinary' emotional need would essentially negate the ICWA presumption." In re C.H., 997 P.2d 776 (Mont. 2000) (citations omitted). As a result, under this form of ICWA implementation the best interests of the particular child is often seen as subordinate to that of the tribe. This denies the scientific reality of secure attachment as a developmental necessity (as discussed above in Section II). It also fails to note that children who are part of healthy tribal cultures are generally in secure attachment relationships within that tribe and, in fact, the tribal presence has not replaced, but supplied the developmental necessity of consistent caretakers. However, taking a child outside a tribe from their securely attached environment is traumatic and a sudden, drastic change to tribal culture and it's unfamiliarity will be alarming. The value that might be provided to a child who grew up amongst the tribal culture may actually be traumatizing to an Indian child whose early experiences were different. When the interests of the tribe are granted superior status over that of the child, the child suffers.

This prioritizing of tribal rights is not uncommon. We see it in this case and in others like *In re S.E.G.* where the mother of three Native American siblings voluntarily placed her children in foster care. The children were split up and each child was placed in at least five different foster homes. After bouncing from home to home, they were reunited in the foster home of a non-Indian couple, E.C. and C.C. But, in compli-

ance with ICWA, the children were subsequently moved to Indian foster homes. When their Indian placements fell apart, the children always returned to the home of the non-Indian couple, who later petitioned for adoption. The Leech Lake Band of Chippewa intervened, arguing that the children should remain in the care of an Indian foster home. Instead of granting the adoption, which would have given the children the loving, permanent home they deserve, the court ruled in favor of the Tribe and ordered that the children remain in foster care. For at least a year, the children continued to languish in temporary care, which can cause or exacerbate attachment disorders, aggressive behavior, anxiety, and depression. Randall Kennedy, *Interracial Intimacies* 514-15 (2003).

The Indian Child Welfare Act should not act to the detriment of children by displacing the longstanding, more holistic best interests of the child standard. When ICWA is often beneficial, particularly if a child has been removed from a tribal culture, but this factor should be just that, a factor, and not a trump card to the many needs a child has to develop successfully and thrive in life.

CONCLUSION

In this particular case and in all cases where the Indian Child Welfare Act may intervene in a child's future, it should be the first priority to look through the lens of a particular child's needs and place them in an environment where that particular child can succeed. In addition to the more tangible and apparent interests of a child to be protected from danger and provided for physically, it is essential that a child be allowed to securely attach to a consistent caretaker and remain in that relationship to ensure

healthy development. Any breaks in such care are traumatic and should be avoided short of some significant intervening threat that endangers a child's wellbeing. The Indian Child Welfare Act when viewed on both state and national levels is unpredictable and prioritizes tribal connection over a child's wellbeing. This court should ensure that if the Indian Child Welfare Act is to intervene in a child's life it should never do so to the detriment of factors contributing to their wellbeing and healthy development.

The court should reverse this decision and remand it with instructions to evaluate the current best interests of this particular child subject to the mandates under South Carolina law and make a determination that will best ensure Baby Girl's future wellbeing and healthy development.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF *AMICI CURIAE* NATIONAL LATINA/O PSYCHOLOGICAL ASSOCIATION, ASIAN-AMERICAN PSYCHOLOGICAL ASSOCIATION, ASSOCIATION OF BLACK PSYCHOLOGISTS, AND SOCIETY OF INDIAN PSYCHOLOGISTS IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the best interests of the child as properly applied supports placement of Baby Girl with Birth Father when current psychological research establishes that children are capable of and desire to form multiple bonds with adults during the first four to five years of life.

2. Whether the best interests standard for child custody determinations under the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.* ("ICWA") should include cultural considerations when Congress clearly recognized the importance of Indian culture in setting adoptive preferences under ICWA and current psychological research supports the view that cultural considerations should be a key component in best interests analysis.

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INTERESTS OF THE *AMICI CURIAE*

Amici are associations of psychologists that have an abiding interest in having courts apply the most current and objective psychological theory and practice in formulating court decisions.[1] This role is particularly important in applying ICWA appropriately, both to take into account the current state of psychological theory on the best interests of the child and to apply the preferences for adoption and custody proceedings set forth in ICWA. These preferences are congruent with current theory that an appropriate application of best interests theory must take into account an expanded view of cultural aspects of child development, which is particularly important in Indian proceedings, as required by ICWA.

Amicus National Latina/o Psychological Association ("NLPA") was re-established in 2002 to create and sustain a supportive professional community that advances the psychological education and training, science, practice and organizational change to enhance the health, mental health, and well-being of Hispanic and Latina/o populations in the United States. The membership of the NLPA is made up of

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici curiae* state that all parties have filed blanket consents to the filing of amicus briefs in this case. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for the parties in this case authored this brief in whole or in part. No person or entity other than *amici curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

students, researchers, and practitioners who work to improve the amount and availability of psychological research and information and to grow the base of psychology professionals equipped to serve the Latina/o population.

Amicus Asian-American Psychological Association ("AAPA") was founded in December 1972 by a group of Asian-American psychologists and other mental health professionals. The AAPA is vitally interested in Asian-American psychology and mental health issues, in the training and education of Asian-American mental health professionals, and in collaborating and networking with peers. Today, the AAPA has over 600 members, who are psychologists, psychology students, master's-level practitioners and others interested in Asian-American research and practice.

Amicus Association of Black Psychologists ("ABP") was founded in 1968 by a number of black psychologists from across the country. They united to actively address the serious problems facing black psychologists and the larger black community. The ABP is organized to promote and advance the profession of African psychology, influence and effect social change, and develop programs whereby black psychologists can assist in solving problems of black communities and other ethnic groups. The ABP has grown from a handful of concerned professionals into an independent organization of over 1400 members.

Amicus Society of Indian Psychologists ("Society") is an organization for Native American people to advocate for the mental well-being of Native peoples by increasing the knowledge and awareness of issues affecting Native mental health. The Society works to support a community of professionals, researchers, and students who seek to share ideas and disseminate knowledge and new information relevant to Native people.

SUMMARY OF ARGUMENT

Section I traces the historical development of adoption and the best interest theory. The best interest method currently used to determine child custody allows the court to weigh a number of factors at its discretion. The means utilized by the court to determine child custody is therefore continuously evolving, accounting for changes in societal norms and individual circumstances encountered. As a result, judges have looked for concrete information to balance the subjective nature of the evaluation.

The use of psychological research and evidence has recently increased in popularity, allowing the court to supplement the discretionary nature of custody determinations with objective data. Attachment Theory, a now commonly used model describing the relationship with a child and its caregivers, provides that a child forms secure attachments to

caregivers during the first four to five years of life. Studies in the area have concluded that children are capable of and desire to form multiple bonds with adults.

Cultural considerations must also be considered in conjunction with Attachment Theory, as the concept was developed for applicability to Western society and does not encompass the customs and traditions pertinent to an Indian child. The strong sense of community, shared spiritual values and large family units are unique aspects of Indian culture that cannot be ignored when determining the best placement of the child. Further, placement of an Indian child into a non-Indian family can have harmful repercussions that can be avoided by allowing the child to remain with Birth Father and develop a healthy cultural identity within the Indian community.

Section II discusses how these current concepts inform the policy determinations made by Congress in its fundamental determination in ICWA that an Indian child's best interest is to protect the child's relationship to the tribe. The statutory preferences of ICWA are presumptively in the best interests of the child. The legislative record of ICWA signals congressional intent that Indian children remain in the Indian culture. As a result, this Court need not engage in the subjective weighing of factors that motivated the passage of ICWA.

Cultural considerations are crucial to the best interests analysis under ICWA. The plain language of ICWA reveals that the "cultural and social standards" of Indian families are to be considered in Indian child custody determinations. This approach comports with prevailing psychological research, which demonstrates that raising Indian children outside of Indian homes risks severe developmental problems that can be avoided by recognizing the importance of cultural considerations.

Finally, Birth Father is a dedicated father, served honorably in the United States Armed Forces and by all accounts is devoted to the well-being of Baby Girl. Despite Petitioners' attempts to disparage Birth Father, the lower courts properly found that Baby Girl's interests would be best served by Birth Father. The factual findings of the South Carolina family court judge, who was best placed to assess the credibility of the evidence, warrant deference.

ARGUMENT

I. Psychological Considerations Must be Appropriately Evaluated to Successfully Determine Custody of a Child.

The methods that courts have used to determine custody of young children have drastically changed over the last 200 years. Throughout the nineteenth century in the United States, property laws dictated the custody of minor children and therefore all rights

were granted to the father following divorce or separation. *See* Jean Mercer, *Child Custody, Attachment Theory, and an Attachment Measure: The Science Remains Limited*, 7 Sci. Rev. Mental Health 37 (2009). The beginning of the twentieth century saw an emergence of the "Tender Years Doctrine," a theory grounded in the idea that mothers were better-suited than fathers to be caregivers. *Id.* The maternal preference was deeply ingrained in both statutes and case law and was only challenged by the dramatic rise in divorce rates beginning in the 1960s. Joan B. Kelly, *The Determination of Child Custody*, 4 Child. & Divorce 121 (1994). "Spurred on [by] fathers' claims of sex discrimination in custody decisions, constitutional concerns for equal protection, the feminist movement, and the entry of large numbers of women into the work force, which weakened the concept of a primary maternal caretaker, most states abandoned the maternal presumption by the mid 1970's." *Id.* The Uniform Marriage and Divorce Act enacted in 1970 was widely adopted by states during the same decade and, for the first time, based a custody determination on the needs and interests of the child. *Id.*

The new standard, however, was not without flaws. The introduction of subjective psychological factors to determine child custody rather than clearly stated laws forced judges to weigh and make determinations based on scientific information. *Id.* at 129. Though the manner by which courts have applied the best interest standard has changed since the concept's inception, the difficulty of applying vague and

discretionary standards to difficult situations remains. *Id.* As a result, and due to the nature of our judicial system, courts have relied heavily on precedent, leaving little room for further evolution and development of the factors applied.

Attachment Theory, a concept derived from studies of orphans following World War I, has gained considerable popularity over the last twenty years as an important factor when determining child placement. Nicola Atwool, *Attachment and Resilience: Implications for Children in Care*, 4 Child Care in Prac. 315, 316 (2006). However, similar to the legal evolution that has occurred regarding the standard to determine child custody, further research and better understanding of childhood development has expanded Attachment Theory and finely tuned the concepts first published almost a century ago. A once-narrow view of childhood development, Attachment Theory has become a complex explanation of development and experience. Unfortunately, and as repeatedly exemplified in the briefs filed in support of Petitioner, Attachment Theory is commonly mislabeled or oversimplified by the term "bonding" and fails to account for the full spectrum of relationships that can form effective bonds.

A. Modern Developments in Attachment Theory Support Baby Girl's Placement with Birth Father.

Attachment Theory was originally developed by John Bowlby and Mary Ainsworth during the early

twentieth century. Inge Brethernton, *The Origins of Attachment Theory: John Bowlby and Mary Ainsworth*, 28 Developmental Psychol. 759 (1992). The theory focuses on the ability of a young child to develop attachments to a very few special adults who are willing and capable of caring for the child. Initial experiments were carried out by the founders, exposing young children to various situations that tested the relationship between the child and caregiver and measured their emotional reactions. Atwool, *supra*, at 316. The results of initial experiments revealed that a figure of attachment played a significant role in managing the infant's anxiety. *Id.* The secure attachment achieved between the child and caregiver then creates a strong base for future relationships and allows a toddler to move toward successful independence. Eleanor Willemson & Kristen Marcel, *Attachment 101 for Attorneys: Implications for Infant Placement Decisions*, 36 Santa Clara L. Rev. 439, 440 (1996).

While the initial observations and experiments conducted by Bowlby and Ainsworth were completed during the first year of life, research has expanded to demonstrate that "the preschool period, between the ages of about eighteen or twenty months and about five years, is an especially important period in the development of children's attachment relationships, and their relationship skills generally." Robert Marvin et al., *The Circle of Security Project – An Attachment-based Intervention with Caregiver – Pre-School Child Dyads*, 4 Attachment & Hum. Dev. 107,

108 (2002). Following infancy, a child has the ability to internally recognize and organize the people to whom they have become attached. *Id.* The first three years of a child's development, while forming an important foundation, do not include all aspects of secure attachment. Willemsen & Marcel, *supra*, at 456-57. During the ages of three through five, significant cognitive development occurs and provides for the acquisition of language skills, expanded social relations and verbal communication that are affected and advanced by a child's secure attachment. *Id.*

These new developments are extremely relevant to the case at hand. The Petitioners and their *amici* have argued that the secure attachment of the Baby Girl was broken at 27 months, and that "physical health, cognition, social skills and emotional competence can all face long term detriment when attachment is broken." National Council for Adoption Br. 13. The assumptions made are ill-founded, based on a narrow view of attachment and fail to address the continuing development of a child's cognitive abilities that occurs after the age the child was placed with the Birth Father. Based on the above research, current psychological theory supports the view that significant attachments can and do take place from one to five years, well within the time that Baby Girl was placed with Birth Father.

The Petitioners and their *amici* also repeatedly assert that the interaction with a caregiver can form an attachment whether that caregiver is connected to the child by legal or biological ties. National Council

for Adoption Br. 12. While this may be true, the claim does not address the true concept of attachment or consider a child's development outside of bonding with a single caregiver. Scientific evidence has shown that "all primates are born with an instinctive desire to form bonds with available adults." David E. Arrendondo & Leonard P. Edwards, *Attachment, Bonding, and Reciprocal Connectedness*, J. Center for Fam., Child. & Cts. 109, 111 (2000). The desire for such bonding to occur does not depend on the particular adult or behavior of that adult, but is a result of the child's genetic makeup. "It is clearly understood that children can, do and should have relationships with more than one caregiver or sets of caregivers." *Id.* at 110; *see also* Willemsen and Marcel, *supra*, at 468. Further, research shows that children afforded responsive, consistent care recover well from any temporary loss of attachment. *See generally* From Neurons to Neighborhoods: The Science of Early Childhood Development (Jack P. Shonkoff & Deborah A. Phillips, eds., 2000) (discussing how children provided with good care can fully develop new attachments). The Petitioners' view again fails to account for the larger environment in which caregivers and children interact and prevailing research on the ability of children to develop new attachment relationships.

B. Cultural Aspects Must be Considered to Ensure Healthy Placement of Baby Girl.

As research has shown the importance of the later ages of a child's development, the underlying concepts of Attachment Theory have also been scrutinized and expanded. Cultural considerations have become extremely important when examining the attachment behavior of a child and are especially significant when a child is not from a culture that follows Western child-rearing practices. Raymond Neckoway et al., *Is Attachment Theory Consistent with Aboriginal Parenting Realities?*, 3 First Peoples Child & Fam. Rev. 65 (2007); *see also* Soo See Yeo, *Bonding and Attachment of Australian Aboriginal Children,* 12 Child Abuse Review 292 (2003). As different cultures have unique parenting styles, the differences of those styles as compared to Western practices must be included in the evaluation of a child's attachment behavior to yield accurate results. Neckoway, *supra*, at 68.

Research has identified three differences in parenting styles that have an impact on Attachment Theory: first, "hypersensitive parenting," a method of very involved and intense parenting; second, "selective parenting," a less intense parenting method of meeting a child's needs; and third, "shared parenting," where multiple caregivers are involved with the raising of the child. *Id.* The Native American culture most closely resembles shared parenting, as large family units and a community environment are key

characteristics. In a study conducted in Israel within a group that valued group cohesion and social function within a community, an extremely small number of children were found to be securely attached to a particular caregiver, and instead formed bonds to multiple adults, indicating that the traditional framework for the Attachment Theory was not cross-culturally applicable. *Id.* at 69; *see also* Yeo, *supra*, at 292.

Similarly, studies conducted within Aboriginal cultures that value extended families, lineage and bloodlines have found that parenting methods resemble selective and shared parenting. Neckoway, *supra*, at 70. The kinship structure of the culture creates multi-layered and multiple bonds between children and their caregivers. While a linear relationship as traditionally formed under the Attachment Theory may not exist, children raised by multiple caregivers in these cultures can establish a "network of attachment relationships." Neckoway, *supra*, at 71. Strong bonds between children and members of their group can therefore be formed as a result of shared values of "interdependence, group cohesion, spiritual connectedness, traditional links to land, community loyalty and interassistance." Yeo, *supra*, at 298.

The results of these studies are extremely important to the case at hand, as the cultural differences noted exist within the Native American community. "An Indian child, like any child, is born to a biological family. However, unlike other children, an Indian is born into a kinship network, clan or band

. . . [and] Indian children develop a strong sense of community because individual goals intertwine with community goals." Lynn Klicker Uthe, *The Best Interests of Indian Children in Minnesota,* 17 Am. Indian L. Rev. 237, 237 (1992). The linear relationship between one caregiver and a child cannot adequately account for the community environment in which a Native American child exists. The children in these communities are strengthened by the sense of unity within the tribes that allows for the development of strong social skills as well as a healthy personal identity.

Cultural considerations are also integral for the application of Attachment Theory to the child's later assimilation into society. "Information from the available data state [that,] in the past 20 years, suicide among Indian youth has increased [1,000] percent. There are ten times as many youth suicides now as in 1963. Indian children placed in non-Indian homes often feel rootless. In adolescence and/or when they leave the non-Indian family, many find that they are neither Indian [nor] non-Indian. These rootless (anomic) feelings often lead to acute hopeless and powerless feelings closely associated with abandonment and stressful loss. The result is a suicide rate among non-Indian adopted Native American adolescents that is twice that found on any reservation." Robert J. McCarthy, *The Indian Child Welfare Act: In the Best Interests of the Child and Tribe*, 27 Clearinghouse Rev. 864, 871 (1993). Other studies indicate that Native Americans raised in non-Native American

homes have substantial social issues, both during adolescence and adulthood.

The Petitioners and their *amici* fail to address these risks specific to Baby Girl's case, as a Native American child placed in the care of a non-Native American couple. The bond Baby Girl may have formed with Adoptive Couple is only one aspect of what Attachment Theory examines and does not account for cultural considerations essential to the child's well-being. Baby Girl clearly would benefit from a strong cultural identity to be successful both socially and emotionally. The risk of psychological harm, as demonstrated by the substantial research cited above, dictates that she should live among other Native Americans, specifically her Birth Father, to foster a sense of belonging and to decrease the risk of serious psychological difficulties.

II. The Lower Court Properly Applied an Appropriate Best Interests Analysis Informed by the Cultural Priorities of ICWA.

Native Americans have endured centuries of abuse, mistreatment, and discrimination. *See* Amanda B. Westphal, Note, *An Argument in Favor of Abrogating the Use of the Best Interests of the Child Standard to Circumvent the Jurisdictional Provisions of the Indian Child Welfare Act in South Dakota*, 49 S.D. L. Rev. 107, 107-110 (2003) (discussing historical abuses suffered by Native Americans). Among the most heart-wrenching examples of this abuse are the

countless stories of Indian children taken from their biological parents and their culture, placing the Indian way of life at risk. Patrice Kunesh-Hartman, Comment, *The Indian Child Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. Colo. L. Rev. 131, 166 (1989). These children, separated from the very people who understand their makeup and their daily challenges and frustrations, often face developmental difficulties with lifelong consequences. *See Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the S. Select Comm. on Indian Affairs*, 95th Cong. 114 (1977) (statement of Drs. Carl Mindell and Alan Gurwitt, American Academy of Child Psychiatry) ("Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough they are cared for by devoted and well-intentioned foster or adoptive parents. Nonetheless, particularly in adolescence, they are subject to ethnic confusion and a pervasive sense of abandonment."). The importance of Indian culture in the rearing of Indian children and the dangers of tearing away an Indian child's cultural foundation are clear. *See In re Custody of S.E.G.*, 521 N.W.2d 357, 358 (Minn. 1994) (stating that ICWA was enacted "to relieve the difficulties experienced by Indian children raised in non-Indian homes"). As a result, it is imperative that this Court, as did the courts below, employ the cultural priorities of ICWA to inform Indian child custody decisions.

Against this backdrop, Congress enacted ICWA "based on the fundamental assumption that it is in

the Indian child's best interest that its relationship to the tribe be protected." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 n. 24 (1989) (quoting *In re Appeal in Pima County Juvenile Action No. S-903*, 635 P.2d 187, 189 (Ariz. Ct. App. 1981)). Congress made several findings in connection with ICWA, including that "the States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901. Much of the national and congressional concern centered on the use of white middle-class values to make the subjective determination regarding the best interests of the Indian child. *See Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 191-92 (1978) (statement of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians) ("Many of the individuals who decide the fate of our children are at best ignorant of our values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit the Indian child.").

A. The ICWA Adoptive Preferences are Presumptively in the Best Interests of Baby Girl.

To ensure that the Indian identity and way of life factored into the decisions regarding Indian child custody disputes, Congress created a series of

placement preferences that govern adoptions of Indian children. 25 U.S.C. § 1915(a) ("[P]reference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."). The preferences are crucial to avoiding a repeat of the culturally biased pre-ICWA decisions of state courts. *See In re Custody of S.E.G.*, 521 N.W.2d at 363 ("The best interests of the child standard, by its very nature, requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture."). Indeed, this Court has stated that the adoptive preferences requirement of § 1915(a) is "[t]he most important substantive requirement imposed on state courts" by ICWA. *Holyfield*, 490 U.S. at 36. Because the preferences are so important to avoiding biased subjectivity and because the preferences may be avoided only for good cause, there is a strong presumption that placement in accordance with the adoptive preferences is in the best interests of the child.

This presumption does not replace the best interests analysis, but rather applies the congressional intent that the adoptive preferences are in keeping with the child's best interests. *See Navajo Nation v. Ariz. Dep't of Econ. Sec.*, 284 P.3d 29, 35 (Ariz. Ct. App. 2012) ("[T]he lodestar for a court is essentially the same as with other custody and placement issues – the best interests of the child. When compared to non-ICWA cases, the difference is

that Congress has spoken and unless good cause is shown, the presumption is that placement of the child in accordance with ICWA preferences is in the best interest of the child."); *see also In re C.H.*, 997 P.2d 776, 780 (Mont. 2000) ("ICWA expresses the presumption that it is in an Indian child's best interests to be placed in an Indian home in conformance with the § 1915 placement preferences."); *In re Custody of S.E.G.*, 521 N.W.2d at 362 ("ICWA appears to create a presumption that placement of Indian children within the preferences of the Act is in the best interests of Indian children."); *People ex rel. A.T.W.S.*, 899 P.2d 223, 224 (Colo. App. 1994) ("The ICWA is based on the presumption that the protection of an Indian child's relationship to the tribe is in the child's best interest."). As a result, this Court need not be concerned with reconciling the adoptive preferences with the litany of factors considered under a best interests analysis. A contrary finding risks re-engaging the subjective policy analysis that Congress sought to avoid. Applying the plain language of the statute, placement in accordance with the preferences, with Birth Father, is in Baby Girl's best interests.

B. Indian Cultural Considerations are Among the Most Important Factors in Best Interests Analysis Based on the ICWA Statutory Intent and Prevailing Scientific Literature.

Petitioners and their *amici* argue that the decisions of the lower courts were clearly contrary to

Baby Girl's best interests. In doing so, Petitioners and their *amici* seek to frustrate the clear Congressional intent of ICWA and ignore scientific research on the subject. Contrary to the contentions of Petitioners and their *amici*, the lower courts engaged in the proper form of best interests analysis, as modified by ICWA.

1. Statutory Intent Supports the Inclusion of Cultural Considerations in Best Interests Analysis.

It is true, as Petitioners and their *amici* maintain, that a best interests analysis is the touchstone of child custody determinations. *See, e.g.*, *Hooper v. Rockwell*, 513 S.E.2d 358, 366 (S.C. 1999) ("This Court long has tried to decide all matters involving the custody or care of children in 'light of the fundamental principle that the controlling consideration is the best interests of the child.'" (quoting *In re Doran*, 123 S.E. 501, 503 (S.C. 1924))); *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925) (Cardozo, J.) (stating that in custody disputes, the judge must act "as *parens patrioe* [sic] to do what is best for the interests of the child. He is to put himself in the position of a 'wise affectionate and careful parent,' . . . and [to] make provision for the child accordingly" (quoting *Queen v. Gyngall*, 2 Q.B.D. 232, 238 (1893)). When an Indian child is involved, however, the traditional state law formulation of best interests analysis must be applied in a manner that comports with prevailing federal law through ICWA. *See In re Mahaney*, 51 P.3d 776,

785 (Wash. 2002) ("Well-established principles for deciding custody matters should further [ICWA's] goals."). As a result, the best interests analysis must be informed by ICWA's clear statement that remaining with her tribe is in the best interests of Baby Girl's development and the preservation of the tribe's heritage.

This Court previously recognized the dangers inherent in ignoring the importance of Indian culture for child adoption and development. *See Holyfield*, 490 U.S. at 37 (stating that ICWA "'seeks to protect the rights of the Indian child as an Indian' by establishing 'a Federal policy that, where possible, an Indian child should remain in the Indian community,' and by making sure that Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family.'" (quoting H.R. Rep. No. 1386, 95th Cong., 2d Sess. at 24 (1978)). Indeed, ICWA protects "'the best interests of Indian children and [promotes] the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.'" *Kickapoo Tribe of Okla. v. Rader*, 822 F.2d 1493, 1501 (10th Cir. 1987) (quoting 25 U.S.C. § 1902).

Congressional intent to include Indian cultural considerations in the best interests analysis is clear not only from the text of ICWA, but also from the

mechanics of the statute. ICWA requires a party "seeking to terminate a parent's rights over an Indian child [to] satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Roman-Nose v. N.M. Dep't of Human Res.*, 967 F.2d 435, 437 (10th Cir. 1992). Further, "to terminate parental rights over an Indian child, the court must make a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses,[2] that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child." *Id.* at 437-38. These requirements present significant and necessary hurdles that indicate Congress' intent to include considerations of Indian culture in the best interests analysis.

2. Child Psychology and Development Theory Support the Use of Indian Cultural Considerations in Best Interests Analysis.

The problem of white, middle-class values unfairly influencing child custody determinations is endemic.

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[2] "Experts are generally qualified through special knowledge of and sensitivity to Indian culture." *In re Welfare of L.N.B.-L.*, 237 P.3d 944, 960 (Wash. Ct. App. 2010). The expert cited by Petitioners from the family court hearing had no familiarity with Indian culture.

See Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 834 (1977) ("Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child."). The problem is particularly pernicious for Indian adoptions. Uthe, *supra*, at 251 (discussing how substitute families are often favored over Indian families and stating that this "favoritism is due in part to misconceptions about cultures"). The application of white, middle-class values and the ignorance of Indian culture causes Indian children to be "removed [from their biological families] to be saved from their own culture." Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 Iowa L. Rev. 585, 605 (1994). Indian cultures, however, approach parenting differently than do traditional "Euro-American" families. *Id.* at 603. These differences extend to, among other aspects of parenting, child discipline and child supervision. *Id.* Further, the concept of family in Indian tribes is distinct from the typical nuclear family observed in the Euro-American tradition. *See* Ronald S. Fischer, *Protecting American Indian Children*, 25 Soc. Work 341, 343 (1980) ("American Indian extended families, by sharing the responsibilities of child rearing, mobilize effectively to protect children in peril, providing the love necessary for children's

normal development."). Instead, Indian families frequently contain parents, grandparents, aunts, uncles, and other tribe members who are directly involved in raising a child. *See* Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 Marq. L. Rev. 21, 28 (1997) ("On many reservations it was once enough for caseworkers to decide arbitrarily that a family was too poor to raise a child. It was overlooked that in tribal cultures the amount of care given a child often went well beyond one household. The full social and blood-tie network of parents, grandparents, relatives and neighbors was a wealth not categorized on a caseworker's clipboard of acceptable standards for child-raising." (quoting Colman McCarthy, *Reopening the Drain on Indians' Legacy*, Wash. Post, July 16, 1996, at B8)). As a result, the traditional, more limited best interests analysis cannot apply for Indian children.

Petitioners and their *amici* advance the argument that ICWA is focused on maintaining Indian culture and not child development, and as a result, is not germane to the best interests analysis. This approach, however, stands in stark contrast to congressional statements made at the time of passage, *see Holyfield*, 490 U.S. at 50 n. 24 ("In large part the concerns that emerged during the congressional hearings on the ICWA were based on studies showing recurring developmental problems encountered during adolescence by Indian children raised in a white environment."), case law, *see In re Adoption of*

T.N.F., 781 P.2d 973, 977 (Alaska 1989) ("We initially note that in enacting ICWA, Congress did not seek simply to protect the interests of individual Indian parents. Rather, Congress also sought to protect the interests of Indian tribes and communities, and the interests of the Indian children themselves."), and subsequent psychological research. *See* Robert McCarthy, *supra*, at 871 ("An environmental factor contributing to higher suicide rates among Indian youth is adoption in which Native American youth are placed in non-Indian families."); *see also* Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 Notre Dame L. Rev. 503, 555 (1984) ("Being raised by parents who share their child's racial, cultural, and ethnic heritage has value, and this deserves recognition."); T.D. LaFromboise et al., *Family, Community, and School Influences on Resilience Among American Indian Adolescents in the Upper Midwest*, 34 J. Community Psychol. 193, 193-209 (2006) (discussing how American Indian children living in accordance with tribal customs often have higher self-esteem). Because the literature on Indian custody holds that culture plays a crucial role in the development of Indian children, this Court should reject the contention of Petitioners and their *amici* that Indian culture and heritage are irrelevant to this case.

There is no doubt that Adoptive Couple would provide Baby Girl with a loving home, but the inquiry does not center on adequacy. Instead, the question is one of *best* interests, considering Indian culture and

the ICWA preferences. The twin aims of ICWA, protecting the best interests of the Indian child and promoting the stability of the Indian tribe, 25 U.S.C. § 1902, are served only via placement of Baby Girl with Birth Father. Given the cultural considerations both explicit and implicit in ICWA, together with the above psychological research, a contrary decision would undermine the best interests of Baby Girl, risk harm to her long-term development, and defeat the congressional intent of ICWA.

C. Petitioners and Their *Amici*'s Narrow and Constrained View of Best Interests Analysis Does Not Comport with the Current State of Psychological Theory and the Statutory Requirements of ICWA.

The arguments of Petitioners and their *amici* also fail because they take an inappropriately narrow view of bonding and attachment. The proper analysis should not be so narrowly focused. South Carolina courts, for example, recognize that the best interests inquiry must consider a long list of factors. *Woodall v. Woodall*, 471 S.E.2d 154, 157 (S.C. 1996) (requiring a best interests inquiry to include "the character, fitness, attitude, and inclinations on the part of each parent as they impact the child," and the "psychological, physical, environmental, spiritual, educational, medical, family, emotional, and recreational aspects of the child's life"). By inflating the importance of bonding and attachment in best interests analysis,

Petitioners and their *amici* risk missing the forest for the trees. Bonding and attachment are relevant, but only for one aspect of the analysis. *See In re Adoption of Halloway*, 732 P.2d 962, 971-72 (Utah 1986) ("While stability in child placement should be a paramount value, it cannot be the sole yardstick by which the legality of a particular custodial arrangement is judged."). Further, while bonding and attachment are relevant, it is clear, as discussed above, that the position of Petitioners and their *amici* on the impact of bonding and attachment in this case is not correct under the prevailing scientific literature on child psychology and development.

In light of the fact that Indian culture must play an important role in best interests analysis under ICWA, bonding and attachment, or indeed any other isolated best interests factor, should not by definition be determinative. *See In re C.H.*, 997 P.2d at 783 ("The emotional attachment between a non-Indian custodian and an Indian child should not necessarily outweigh the interests of the Tribe and the child in having that child raised in the Indian community."); *see also In re Adoption of M.T.S.*, 489 N.W.2d 285, 288 (Minn. Ct. App. 1992) ("Under [the ICWA] standards, placing [Indian child] with [Indian grandmother] is presumptively in his best interests. Although the record indicates that the Nelsons provided [Indian child] with a loving foster home, the fact that separation from them will be initially painful to [Indian child] is not good cause to defeat the preference created by the ICWA."). The argument that bonding

and attachment should not be afforded undue weight in the best interests analysis is strengthened in the context of Indian child custody determinations. *See* Judy C. Pearson & Jeffrey T. Child, *A Cross-Cultural Comparison of Parental and Peer Attachment Styles among Adult Children from the United States, Puerto Rico, and India*, 36 J. Intercultural Comm. Res. 15, 16 (2007) ("Attachment does not generalize across all co-cultures: relationships among attachment, and gender, ethnicity, and sexual orientation have been discovered."); *see also* Neckoway et al., *supra*, at 68 ("A number of researchers have pointed out that attachment theory makes assumptions, based on Western ideologies, regarding ideal dyadic relationships and preferred developmental outcomes based on the mother-infant bond. For instance, not all cultures expect mothers to be the sole caregiver nor do all cultures interpret the child's needs in the same way or have the same reactions to emotional expression, such as the meaning of an infant's cry. What surely must come into question then, is the universal applicability of attachment theory.").

Petitioners and their *amici* also argue for a reversal of the lower court's opinion on grounds that bonding and attachment should be afforded such weight as to be determinative in child custody cases. *See* Child Advocacy Organizations Br. 9-13; National Council for Adoption Br. 11-14. Such a reversal of the South Carolina court's decision also risks creating precedent that could lead to absurd results by focusing disproportionately on bonding and attachment.

Consider for example, a child kidnapped immediately after birth. The child lives with the kidnapper for seven years, presumably bonding with the kidnapper, who is then discovered. At this point, society would surely say that the child should be taken away from the kidnapper, but the intractable adherence of Petitioners and their *amici* to bonding and attachment would invalidate any attempts to remove the child from the kidnapper's custody. Furthermore, a reversal of the lower court's decision would create an incentive for parties to deliberately ignore the purposes of ICWA and to engage in protracted litigation. In the present case, Birth Mother and Adoptive Couple declined to observe the requirements of ICWA, and instead moved to place Baby Girl with non-Indian parents in clear contradiction of ICWA preferences, despite Birth Mother's acknowledgement that she knew of Birth Father's Indian heritage. Thus, by failing even the preliminary requirements of ICWA, Adoptive Couple was afforded the opportunity to bond with Baby Girl over the course of the ensuing litigation. It would be an inequitable result to reward Adoptive Couple by relying on any attachment that may have occurred during the pending litigation. Such reliance would promote more and longer lawsuits in an area, child custody and parental rights, where litigation is often least desired. As a result, a reversal would reward parties for turning a blind eye to the requirements of federal law and would encourage more litigation. Surely such an outcome could not be within Congress' intent, and such an outcome

would not be a practical and reasonable decision by this Court.

D. The Decisions of the Lower Courts Were in the Best Interests of Baby Girl and the Factual Findings of the Family Court are Entitled to Deference.

The lower courts properly applied the best interests analysis, and the decisions of the lower courts are in the best interests of Baby Girl. Despite attempts by Petitioners to characterize Birth Father as uninterested and disinclined to be an effective parent, the facts indicate quite the opposite. An analysis of those factors typically considered, including the character, fitness, and inclinations of the parent, and the psychological, physical, environmental, spiritual, educational, medicinal, family, emotional, and recreational needs of the child, *see Woodall*, 471 S.E.2d at 157, yields the conclusion that remaining with Birth Father would be in Baby Girl's best interests.

Birth Father "was excited to learn of the pregnancy and urged [Birth Mother] to move the wedding date forward" so that "she and the unborn child would have military health coverage during and after the pregnancy." Pet. App. 105a.[3] The relationship,

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[3] This brief cites to the family court opinion that is reprinted in the sealed petition appendix. Like the opinion of the South Carolina Supreme Court, this brief uses only pseudonyms in referring to the parties and contains no personal identifying information.

however, became strained and Birth Mother "broke off the engagement . . . via text message." *Id.* at 3a. Birth Mother "sent a text message to [Birth] Father asking if he would rather pay child support or surrender his parental rights." *Id.* at 4a. Birth Father responded "that he would relinquish his rights," but Birth Father testified that he thought that he was relinquishing his rights to Birth Mother and not that he was consenting to adoption. *Id.* at 4a. At this point, "[a]ll attempts to contact [Birth Mother] by [Birth Father] and his family members were refused by [Birth Mother]." *Id.* at 106a. After Birth Father's attempts to contact Birth Mother were rebuffed, there was no further communication until "days before [Birth] Father was scheduled to deploy to Iraq," when Birth Father was served with legal papers declaring that "he was not contesting the adoption of Baby Girl." Pet. App. 8a-9a. Realizing that Birth Mother had relinquished her rights to Petitioners, Birth Father sought a stay of the adoption proceeding and initiated a custody action. *Id.* at 9a. Though the downfall of the relationship was perhaps bitter and difficult, these facts indicate that Birth Father wanted to be involved in the life of his child, and when faced with the prospect of Baby Girl being adopted, Birth Father immediately acted to preserve his right to love and care for his child.

Additionally, Birth Father is a responsible individual who is fit to be a loving father. Birth Father "was deployed to Iraq, where he served this country honorably during Operation Iraqi Freedom for a

period of nearly one year." *Id.* at 108a. The family court noted that Birth Father "is the father of another daughter," *id.* at 126a-127a, so he has experience with the demands of parenting. "The undisputed testimony is that [Birth Father] is a loving and devoted father. Even [Birth Mother] herself testified that [Birth Father] was a good father." *Id.* Clearly, Birth Father is well-qualified to provide the loving care that Baby Girl deserves. The South Carolina Supreme Court agreed, stating that "we cannot say that Baby Girl's best interests are not served by the grant of custody to [Birth Father], as Appellants have not presented evidence that Baby Girl would not be safe, loved, and cared for if raised by [Birth Father] and his family." *Adoptive Couple v. Baby Girl*, 731 S.E.2d 550, 566 (S.C. 2012).

The facts of this case clearly support Birth Father's fitness to raise Baby Girl in a happy, loving home. The family court determined as much, and the Court should not disregard the findings of the family court, which occupies a "superior position to make credibility determinations." *Id.* at 637 (citing *Lewis v. Lewis*, 709 S.E.2d 650, 651, 654 (S.C. 2011)); *see also Lewis*, 709 S.E.2d at 652 ("The . . . standard of review does not relieve an appellant from demonstrating error in the trial court's findings of fact.")); *see also In re Welfare of L.N.B.-L*, 237 P.3d 944, 965 (Wash. Ct. App. 2010) ("We place 'very strong reliance' on the juvenile court's determination of what would be in the child's best interests." (quoting *In re Interest of Pawling*, 679 P.2d 916, 921 (Wash. 1984))). Additionally,

this Court has repeatedly held that "concurrent findings of fact by two courts below," as in the present case, will not be reviewed "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *see also Exxon Co. v. Sofec*, 517 U.S. 830, 840 (1996) (finding mere "tension" in the findings of the courts below to be inadequate to meet the "obvious and exceptional" standard for the review of concurrent factual findings of the lower courts); *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944) ("It must be a strong case in which this court will set aside these concurrent findings of two courts."). In light of the compelling facts indicating Birth Father's fitness to care for Baby Girl, neither Petitioners nor their *amici* have succeeded in "demonstrating error," *Lewis*, 709 S.E.2d at 652, in the findings of fact of the Family Court, which was in a "superior position to make credibility determinations." *Adoptive Couple*, 731 S.E.2d at 637. Because Birth Father has the ability, and is likely, to provide loving care to Baby Girl, along with the fact that Baby Girl's interests are furthered by remaining in her culture, to remove Baby Girl from Birth Father would cause irreparable harm.

CONCLUSION

The decision of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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March 27, 2013

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-399

Supreme Court, U.S.
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Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioner,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF 14 YEARS, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are state and national bar associations. The bar associations have been involved in providing legal education of Indian issues and submit this brief to inform the Court regarding the effect of the Indian Child Welfare Act as an essential tool in protecting tribal interests.

Amici National Native American Bar Association ("NNABA") is the oldest and largest association of predominantly Native American[2] attorneys in the United States. NNABA was founded in 1973 when the first group of Native American attorneys was entering the legal profession. One of the purposes of the National Native American Bar Association is to sponsor and engage in programs and activities that address the social, cultural, political, and legal issues affecting tribal nations. NNABA goals include (1) protecting the sovereignty of tribal nations; and (2) promoting the public understanding of the unique legal status of Native Americans.

Amici Indian Law Section of the Wisconsin State Bar is comprised of over 100 attorneys licensed to

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no persons or entity, other than *amici curiae* and their counsel, made a financial contribution for the preparation or submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been lodged with the Clerk.

[2] Native American includes American Indian, Alaska Native, and Native Hawaiian.

practice law in Wisconsin who have an interest in, or work directly with, Indian law issues. The membership includes private attorneys, attorneys employed by the United States, tribal, or state governments, and public interest attorneys. The membership of the Section have identified Indian Child Welfare issues, including the federal Indian Child Welfare Act and its codification into Wisconsin law, the Wisconsin Indian Child Welfare Act, as a major issue in the practice of Indian law in Wisconsin.

SUMMARY OF ARGUMENT

The Indian Child Welfare Act provides a baseline; it affords a minimum protection Congress expressly granted to Indian Tribes as a guarantee of their sovereign relations with their tribal members in order to protect that relationship from unnecessary and detrimental state interference through family law proceedings. Failure to acknowledge the independent tribal interest that ICWA protects and a myopic focus exclusively on the parental roles, as Petitioners argue, would yield the very results for the adoption of Indian children that Congress expressly intended to end when it enacted ICWA.

ICWA requires state courts to recognize a Tribe's independent sovereign interest to intervene in custody proceedings involving its children, separate and apart from a parent's interest. Through this

mechanism, Congress sought to end this country's legacy of cultural genocide.

ARGUMENT

I. The Indian Child Welfare Act's singular purpose is to protect Tribes' sovereign interest in their citizens.

The Indian Child Welfare Act of 1978 ("ICWA") is clear on its face: it seeks to protect "the rights of the Indian community and Tribe in retaining its children in its society."[3] The text of the statute recognizes the special relationship between the United States and Indian Tribes and assumes a federal responsibility "for the protection and preservation of Indian Tribes and their resources" including the "continued existence and integrity of Indian Tribes and their children."[4] Additionally, the statute's legislative history and this Court's interpretation of the statute in *Mississippi Band of Choctaw Indians v. Holyfield* affirms its purpose to protect a Tribe's interest in maintaining political relationships with its children.[5]

Custody proceedings commonly involve individual rights protected under state laws and, in some cases,

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[3] Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et seq.* (2012); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (citing H.R. REP. NO. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546).

[4] 25 U.S.C. § 1901.

[5] 490 U.S. at 34.

the independent interests of the state. However, federal law can impose additional requirements in areas otherwise dominated by state regulation. For example, states had previously issued driver's licenses and identification cards pursuant to state law. Following the passage of the REAL ID Act in 2005, however, Congress established minimum federal document requirements and issuance standards for driver's licenses and identification cards.[6] States must now meet federal standards in order for their state-issued licenses to be accepted by federal agencies such as the Transportation Security Administration.[7] Federal law also imposed additional requirements on state courts when it enacted the Adoption and Safe Families Act of 1997, designed to promote adoption and support families.[8] ICWA serves the same function by placing minimum federal requirements in all state court custody proceedings involving an Indian child.[9]

ICWA directs state judiciaries to consider additional factors in a family law proceeding that would otherwise be administered under state law.[10]

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[6] REAL ID Act of 2005, Pub. L. No. 109-13, § 202, 119 Stat. 231, 302-323 (2005).

[7] *Id.*

[8] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

[9] 25 U.S.C. §§ 1902-03, 1911, 1915.

[10] *Id.* at § 1902 ("Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards

(Continued on following page)

In custody proceedings involving an Indian child as defined by ICWA, Congress acted to protect a Tribe's interest in the placement of its citizens.[11] Congress acted to protect a Tribe's interest by recognizing tribal courts' exclusive jurisdiction over children domiciled on the reservation and requiring notice to Tribes of custody proceedings.[12] Furthermore, ICWA allows for tribal intervention in state custody proceedings and provides for tribal law to determine the placement of Indian children.[13] ICWA requires state courts to take tribal interests into consideration, in order to prevent lasting and permanent repercussions to Tribes.[14]

A. ICWA's plain language protects tribal interests in state court proceedings.

In interpreting a statute, the Court "start[s] with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used."[15] Courts must assume that Congress "says in a statute what it means and means in a statute what it says

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for the removal of Indian children from their families and the placement of such children in foster or adoptive homes. . . .").

[11] *Id.* at § 1903(4).

[12] *Id.* at §§ 1911-12.

[13] *Id.* at § 1911; *Holyfield*, 490 U.S. at 51.

[14] *Holyfield*, 490 U.S. at 50 (citing S. REP. NO. 95-597, at 52 (1977) ("Removal of Indian children from their cultural setting seriously impacts a long-term tribal survival. . . .").

[15] *Id.* at 47 (citing *Richards v. United States*, 369 U.S. 1, 9 (1962)).

there."[16] Congress could not have been clearer in its findings.[17] ICWA protects a Tribe's interest in the custody proceedings of its tribal citizens or potential citizens.[18] The plain language of ICWA emphasizes that it seeks to protect children as tribal resources "vital to the continued existence and integrity of Indian tribes."[19] Congress assumed responsibility for "the protection and preservation of Indian tribes and their resources," and as such, "has a direct interest . . . in protecting Indian children who are members of or are eligible for membership in an Indian tribe."[20] The statutory text continuously protects a Tribe's sovereign interest by requiring state courts to consider the independent tribal interest to maintain a relationship with its minor citizens in the course of custody proceedings.

1. Tribal citizenship triggers ICWA's application in custody proceedings.

The statute's triggering mechanism requires tribal citizenship of either the Indian child or one of the child's parents.[21] For ICWA to apply to a custody

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[16] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

[17] 25 U.S.C. § 1901.

[18] *Id.* at § 1902.

[19] *Id.* at § 1901(3).

[20] *Id.*

[21] *Id.* at § 1903(4).

action, a child must qualify under ICWA's definition of "Indian child."[22] Under ICWA, an "Indian child" means any minor who is either "(a) a *member* of an Indian tribe or (b) eligible for *membership* in an Indian tribe and is the biological child of a *member* of an Indian tribe."[23] The definition of "Indian child" requires an existing political relationship with the Tribe in order for ICWA to apply.[24] If the child is not a member of an Indian Tribe, then at least one biological parent must be a member.[25] It is not sufficient that an Indian child's parent is merely eligible for tribal membership; the parent must be a *current* member of an Indian Tribe.[26] Furthermore, throughout ICWA, "Indian" refers to "a member of an Indian tribe."[27]

ICWA's tribal membership requirement is consistent with its purpose to protect a Tribe's sovereign interest in its citizens.[28] The tribal membership requirement focuses exclusively on a child's relationship with his or her Tribe.[29] Unless a child is eligible for tribal citizenship, he or she does not fall under the protections of ICWA irrespective of any Indian

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[22] *Id.*

[23] *Id.* (emphasis added).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at § 1903(3).

[28] *Id.* at §§ 1902, 1903(4).

[29] *Id.* at § 1903(4).

ancestry the child may have.[30] If Congress intended for ICWA to focus on the familial relationship, rather than the independent interest of the Tribes in their minor citizens, it could have drafted a broader triggering mechanism that only requires a racial ancestry component. Instead, Congress focused exclusively on tribal citizenship.

2. ICWA protects tribal interests throughout a custody proceeding.

The provisions stemming from ICWA's triggering mechanism ensure that a *Tribe's* independent interests in its citizens are protected.[31] Notably, Section 1912 requires notice to the Indian child's Tribe for any involuntary proceeding in a state court.[32] In a custody matter where the involuntary placement of an Indian child would otherwise occur under state law, a state court must not only notify the Indian child's parents, but also the child's Tribe.[33] Following notice, ICWA requires the state court to delay the custody proceedings until at least ten days after receipt of notice in order to provide an opportunity for the

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[30] *Id.*

[31] *Id.* at §§ 1911-12, 1914-15, 1917-19.

[32] *Id.* at § 1912(a).

[33] *Id.* (failure to give proper notice to a Tribe renders the proceedings null and void); *In re Morris*, 815 N.W.2d 62, 83 (Mich. 2012) (proper remedy for ICWA notice violations is to conditionally reverse and remand to restore the notice requirements).

Tribe to intervene.[34] Even in voluntary proceedings, where Indian parents have consented to an adoption, ICWA provides minimum standards and allows Tribes to intervene to contest the adoption, as this Court recognized in *Holyfield*, in the event of a failure to comply with these standards.[35]

ICWA's notice requirements are essential to protecting a Tribe's sovereign interest in its citizens. A Tribe must always receive notice.[36] Limiting ICWA's triggering mechanism to parental engagement, as Adoptive Parents argue in this matter, runs the risk that a biological parent's bad behavior will deny a Tribe the notice necessary to assert and protect its independent interests.[37] Accepting the Petitioners' arguments would permit a parent to effectively nullify a Tribe's independent sovereign interest in its citizens without any notice, thereby denying the Tribe's ability to invoke the protections guaranteed by ICWA.

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[34] 25 U.S.C. § 1912(a).

[35] *Id.* at § 1914; *see also Holyfield*, 490 U.S. at 36.

[36] 25 U.S.C. § 1912(a) (note that all provisions directed at a parent may also apply to Indian custodians); *In re H.D.*, 729 P.2d 1234, 1241 (Kan. App. 1986) (failure to notify Tribe invalidated termination of parental rights); *In re B.R.*, 176 Cal. App. 4th 773 (Ca. App. 2009) (reversal based on failure to provide notice to Tribe).

[37] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-314 (1950) ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.").

B. ICWA's legislative history confirms Congress' intent to protect tribal interests.

While ICWA clearly sets forth its purpose, the legislative history further demonstrates that Congress intended to preserve a Tribe's independent sovereign interest in its citizens. In enacting ICWA, lawmakers understood that "[i]f tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right . . . to provide for the care and upbringing of its young, *a sine qua non* to the preservation of its identity."[38] In the years since Congress passed ICWA, Congress has continued to recognize the statute's purpose to protect tribal interests in state custody proceedings.[39]

Removing children from their homes constitutes an unfortunate part of this country's tragic history of colonizing Indian Tribes. From legalized enslavement to forcible assimilation, states that deprived Tribes of their children were acting through a familiar form of cultural genocide. For example, the Virginia colony enslaved Indian children as a matter of law.[40]

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[38] S. REP. NO. 95-597, at 50 (quoting *Wisconsin Potowatomies of Hannahville Indian Cmty. v. Houston*, 393 F. Supp. 719, 730 (W.D. Mich. 1973)).

[39] 149 CONG. REC. E2282 (daily ed. Nov. 7, 2003); S. REP. NO. 105-156, at 26 (1997).

[40] *See* Law of Oct. 22, 1720, ch. IV, § XXII, 1720 Acts of the General Assembly of the Commonwealth of Va., ch. 4, 22 ("[W]here any . . . Indian . . . shall, during the Time of her Servitude, have any Child born of her Body, every such Child shall serve the Master or Masters of such . . . Indian.").

Post-independence and more than 150 years later, the federal government still sought control of Indian children – this time through forcibly assimilating them in boarding schools.[41] Official federal policy sought to destroy what was left of tribal cultures and found that "the eventual civilization of Indians may be reached through the education of their children; and further, that it could be brought about more speedily by that method than by any other."[42] In order to accomplish this policy, the government urged "[s]uch education can be given only to children removed from the example of their parents."[43]

The detrimental trend of removing Indian children from their homes continued well into the next century, and was only finally addressed by lawmakers with the passage of ICWA. Congressional hearings leading up to the passage of ICWA demonstrated the damaging effect that removal of Indian children had on Indian Tribes.[44] Lawmakers directly noted the concern that "Indian cultures are being destroyed by this practice [of removing Indian children from tribes]

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[41] ANNUAL REP. TO THE SEC'Y OF THE INTERIOR ON THE OPERATIONS OF THE DEP'T FOR THE FISCAL YEAR ENDED JUNE 30, 1878, REP. OF THE COMM'R OF INDIAN AFFAIRS at 439 (1878).

[42] *Id.* at 458.

[43] *Id.* at 439.

[44] S. REP. NO. 95-597, at 50, 52.

since so many Indian children are learning non-Indian ways."[45]

Congress confirmed what tribal leaders already knew: that "our children are our greatest resource, and without them we have no future."[46] In finding that "there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the . . . tribe to govern [itself] than to interfere with tribal control over the custody of [its] children," the House of Representatives recognized that "a tribe's children are vital to its integrity and future."[47] Leading senators who backed ICWA emphasized the need to protect and strengthen tribal communities. Senator Abourezk stated, "[o]fficials seemingly would rather place Indian children in non-Indian settings where their Indian culture, their Indian traditions and, in general, their entire Indian way of life is smothered. . . . This course can only weaken rather than strengthen the Indian child, the family, and the

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[45] 123 CONG. REC. 21,043-44 (1977) (statement of Sen. Abourezk, Chairman, Senate Select Committee on Indian Affairs (quoting Mr. Phyllis Fast Wolf, an Oneida living in Chicago)).

[46] *Indian Child Welfare Act of 1978: Hearing Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 78 (1978) (statement of Faye La Pointe, Coordinator of Social Service for Child Welfare, Puyallup Tribe of Washington).

[47] H.R. REP. NO. 95-1386, at 15 (1978) (quoting *Wakefield v. Little Light*, 347 A.2d 228 (Md. 1975)).

community."[48] While "the Federal Government purports to be working to help strengthen Indian communities," Senator Abourezk noted ongoing attempts to annihilate tribal cultures.[49] "It has been called cultural genocide."[50] Through ICWA's enactment, Congress provided Tribes a mechanism to protect tribal interests in their citizens by restoring "jurisdiction over the welfare of a precious resource: their youth."[51]

In the years following ICWA's enactment, Congress repeatedly emphasized an Indian Tribe's interest in its children. It strongly emphasized that Tribes have "a *parens patriae* relationship with all children who are members of the tribe or who are eligible for tribal membership and who are children of tribal members."[52] The doctrine of *parens patriae*, literally meaning "parent of his or her country" in Latin, is ordinarily used to describe the sovereign power of the state to act as a guardian for those who are unable to

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[48] *Indian Child Welfare Act of 1977: Hearing Before the United States S. Select Comm. on Indian Affairs*, 95th Cong. 2 (1977) (opening remarks of Sen. Abourezk).

[49] *Id.*

[50] *Id.*

[51] *Indian Child Welfare Act of 1978, Hearing Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 154 (1978) (statement of Trilby Beauprey, Director, Alternative Living Arrangements Program, Great Lakes Inter-Tribal Council, Inc.).

[52] S. REP. NO. 105-156, at 26 (1997).

care for themselves, namely children.[53] On the 25th anniversary of ICWA, Alaskan Congressman Don Young expanded upon the *parens patriae* relationship between Indian Tribes and Indian children, finding that it

> supersedes any like interest of the States. . . . Accordingly, the law enhances the sovereign right of Tribes to determine, under tribal law, whether and under what circumstances children require out-of-home placement.[54]

Thus, ICWA's text and legislative history affirms that an Indian Tribe has a sovereign right to act on behalf of its children.

C. This Court recognizes ICWA's principle purpose to protect tribal interests.

In *Mississippi Band of Choctaw Indians v. Holyfield*, this Court found that Congress made clear that ICWA "seeks to protect the rights of the Indian child as an Indian *and the rights of the Indian community and tribe in retaining its children in its society.*"[55] While the dissent incorrectly argued that the most important provisions of ICWA are those setting

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[53] BLACK'S LAW DICTIONARY (9th ed. 2009).

[54] 149 CONG. REC. E2282 (daily ed. Nov. 7, 2003) (statement of Rep. Young).

[55] 490 U.S. at 37 (1989) (citing H.R. REP. NO. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N 7530, at 7546) (emphasis added).

"minimum standards . . . to insure that parental rights are protected,"[56] ICWA and its separate protections of tribal interests in Indian children would not apply but for an already existing tribal citizen relationship with either the child or at least one of the child's parents.[57] The statute does not provide mechanisms for Tribes to intervene on behalf of parents, and this Court never ascribed such a purpose in *Holyfield*. Instead, the majority in *Holyfield* held that Congress intended for ICWA's jurisdictional and notice provisions to apply even in cases where the parents consented to an adoption "because of concerns going beyond the wishes of individual parents. . . ."[58] Otherwise, parents, Indian or non-Indian, could undermine the independent tribal sovereign interest protected under federal law by ICWA, as the biological mother attempted to do in *Holyfield*.[59]

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[56] *Id.* at 55 (Stevens, J., dissenting).

[57] 25 U.S.C. § 1903(4).

[58] 490 U.S. at 50 (finding that the removal of Indian children from their cultural setting seriously impacts a Tribe's long-term survival).

[59] *See id.* at 49 (quoting 25 U.S.C. § 1901(3) on how "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children" and 25 U.S.C. § 1902 on ICWA's purpose to "promote the stability and security of Indian tribes").

II. ICWA's purpose to protect Tribes' interests in their children is distinct from individual parental interests.

The core tenet underlying ICWA protects a Tribe's independent sovereign interest in its children.[60] Tribes depend on Indian children, a vital tribal asset, to transmit tribal culture. Congress recognized that depriving any tribal government of its citizens and potential leaders constituted an act of ethnocide, if not genocide, which it sought to stop.[61] A focus on parentage instead of citizenship undermines the independent tribal sovereign interest that Congress sought to protect when it enacted ICWA.[62]

ICWA protects a Tribe's interest in its children and the children's right to be tribal citizens. In *Holyfield*, this Court emphasized "that the tribe has an interest in the child which is distinct from but *on a parity* with the interest of the parents."[63] Indian

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[60] *Id.* at 52 (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986)); *see also* BIA Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67585-86 (November 26, 1979) (outlining Congress' "clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children who must be removed from their homes within their own families or Indian tribes").

[61] *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs, Comm. on Interior and Insular Affairs*, 93rd Cong. 2 (1974) (opening remarks of Sen. Abourezk).

[62] 25 U.S.C. § 1902.

[63] 490 U.S. at 52 (emphasis added) (quoting *Halloway*, 732 P.2d at 969).

children have a corresponding interest in maintaining a relationship with the Tribe, even if the parents do not share that interest.[64] This Court found that a Tribe's interest in its children may trump a parent's adoption decision.[65]

Without the protections of ICWA, Indian children would continue to be placed in homes that would deprive these children of their right to be citizens within their Tribes. Tribes would also lose their ability to convey their culture, customs, language, and origin stories to the next generation of their potential members. Congress protects these interests in the text of the statute.[66] For example, if an Indian child is born to a non-Indian parent and has always resided with the non-Indian parent, ICWA still applies to protect the rights of the Tribe.[67] ICWA's purpose of protecting a Tribe's sovereign interest in its citizens ensures tribal integrity and survival.

Sovereigns commonly exercise authority over adoptive proceedings, especially where there are concerns over the best interests of children. The independent tribal interests protected in ICWA parallel those of the United States in outgoing adoptive proceedings with foreign countries. The United States

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[64] *Id.* at 49-50.

[65] *See Holyfield*, 490 U.S. at 50.

[66] 25 U.S.C. § 1902.

[67] *See Adoption of Lindsay C.*, 229 Cal. App. 3d 404, 415-416 (Cal. App. 1991).

is a party to the Hague Convention on Adoption.[68] As part of a United States outgoing adoptive case, the adoptive service provider must make reasonable efforts to recruit or make a placement with prospective adoptive parents within the United States through a diligent search prior to an international placement, with limited exceptions.[69] The Convention Preamble echoes this policy: "... inter-country adoption may offer the advantage of a permanent family to a child *for whom a suitable family cannot be found in their State of origin.*"[70] ICWA serves an identical function within the adoptive placements of Indian children, preferring family, tribal, and cultural placements above non-Indian placements.[71] Both the Convention and ICWA acknowledge and protect the sovereign's citizenship interests in adoptive proceedings and recognize that the relationship between the sovereign and the child is mutually beneficial and in the child's best interest.

ICWA provides a baseline; it affords a minimum protection to Tribes as a guarantee of their sovereign relations with their tribal members in order to protect that relationship from unnecessary and

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[68] 42 U.S.C. § 14901 (2000).

[69] 22 C.F.R. § 96.54 (2012).

[70] Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, Mar. 31, 1994, Intercountry Adoption Universal Accreditation Act of 2012, 42 U.S.C. § 14901 (2000) (emphasis added).

[71] 25 U.S.C. § 1915.

detrimental state interference.[72] Failure to acknowledge the independent tribal interest that ICWA protects in Indian child adoptions, and a myopic focus exclusively on parental roles, as Petitioners argue, would yield the very results that Congress expressly intended to end when it enacted ICWA.[73]

III. The purported existing Indian family doctrine exception to ICWA conflicts with ICWA's purpose of protecting Tribes' independent sovereign interest in their citizens.

The existing Indian family doctrine, relied upon by the Petitioners, is an exception invented by state courts to avoid the application of federal law, and conflicts with language and purposes of ICWA and this Court's decision in *Holyfield*.[74] Although sixteen states had used the existing Indian family doctrine, as of 2013, only six states continue to apply the

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[72] *Id.* at § 1902.

[73] *See id.* at § 1901(4)-(5) (acknowledging the "alarmingly high percentage" of non-Indian adoptions of Indian children and states' historical failure to acknowledge tribal interests in adoption proceedings); 25 U.S.C. § 1902 (declaring Congress' policy "to protect the best interests of Indian children" and promote tribal interests).

[74] *See* 490 U.S. at 49-50 (1989); *see also* Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 36 (1998) (noting that the existing Indian family doctrine undermines tribal sovereignty).

doctrine.[75] Nineteen states have either judicially or legislatively expressly rejected the doctrine.[76] State courts that continue to use the doctrine inaccurately contend that ICWA is only applicable in cases where an Indian child is removed from a setting in which the court determines that an existing Indian family will be disrupted.[77] In *Holyfield*, the children whose adoption was at issue had not lived in any Indian

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[75] *See, e.g.*, *Ex Parte C.L.J.*, 946 So. 2d 880, 889 (Ala. Civ. App. 2006); *In re Adoption of D.C.*, 928 N.E.2d 602, 605 (Ind. App. 2010) (citing *In re T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988)); *C.E.H. v. L.W.M.*, 837 S.W.2d 947, 952 (Mo. App. 1992) (citing *In re Crews*, 825 P.2d 305, 308 (Wash. 1992)); *Rye v. Weasel*, 934 S.W.2d 257, 263 (Ky. 1996); *Hampton v. J.A.L.*, 658 So. 2d 331, 334-335 (La. Ct. App. 1995) (citing *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982)); *In re K.L.D.R.*, No. M2008-00897-COA-R3-PT, 2009 WL 1138130, at *4-5 (Tenn. App. Apr. 27, 2009) (citing *In re Morgan*, No. 02A01-9608-CH-00206, 1997 WL 716880, at *16 (Tenn. App. Nov. 19, 1997)); Dan Lewerenz & Padriac McCoy, *The End of "Existing Indian Family" Jurisprudence: Holyfield at 20, in the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 687 (2010).

[76] *See* Lewerenz & McCoy at 687; *see, e.g.*, Wis. Stat. § 938.028(3)(a) (2012) (denying the court the ability to determine the application of ICWA based on whether the juvenile Indian is part of an existing Indian family); *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989) (refusing to adopt the existing Indian family doctrine, and noting the congressional intent to protect tribal interests).

[77] *See, e.g.*, *In re Adoption of Baby Boy L.*, 643 P.2d at 174-175 (Kan. 1982) (noting the court's reasoning for the adoption of the existing Indian family doctrine, as "the maintenance of the family and tribal relationships existing in Indian homes"), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

family since birth.[78] Nevertheless, this Court firmly rejected the notions behind an existing Indian family doctrine exception and instead agreed with the Supreme Court of Utah finding "the protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from . . . the interest of parents."[79] Thus, the few states that continue to follow the so-called existing Indian family exception are disregarding the precise holding of this Court's decision in *Holyfield* and evading their legal obligations under ICWA.

A. ICWA's language does not support the existing Indian family doctrine.

The plain language of ICWA does not support the existing Indian family doctrine. ICWA's congressional findings acknowledge that (1) Congress, as part of its trust responsibilities, has a duty to protect Indian Tribes and their resources, and (2) Indian children are the most vital resource to the continued existence of Tribes.[80] Proponents incorrectly argue that the congressional declaration of policy establishes ICWA's primary goal as the maintenance of existing Indian

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[78] *Holyfield*, 490 U.S. at 48-49.

[79] *Id.* at 52 (citing *In re Adoption of Halloway*, 732 P.2d 962, 969-970 (Utah 1986)).

[80] 25 U.S.C. § 1901(2)-(3).

families.[81] On the contrary, ICWA expressly states that the purpose of the statute is to promote "the stability and security of Indian tribes and families."[82] This notion is reflected in ICWA's placement preferences, where both immediate *and extended* family members are eligible placement candidates, as well as a member of the Indian child's Tribe.[83] The placement consideration illustrates the congressional intent to maintain ties with the Tribe through suitable adoptive placements, rather than a specific family unit.

The existing Indian family doctrine imposes requirements not contemplated by Congress.[84] Congress would have defined "existing Indian family" had they intended an existing Indian family exception to apply to ICWA. Congress passed ICWA to remedy the state's imposition of its cultural values when child custody proceedings involve Indian children. ICWA sought to foreclose this exact type of state infringement of tribal interests and sovereignty that

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[81] *See, e.g., In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982), *overruled by In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

[82] 25 U.S.C. § 1902.

[83] 25 U.S.C. § 1917.

[84] Charmel L. Cross, *The Existing Indian Family Exception: Is It Appropriate to Use A Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?*, 26 CAP. U. L. REV. 847, 849 (1997).

proponents of the existing family doctrine seek to advance.[85]

B. ICWA does not invoke a racial classification.

ICWA does not violate the Equal Protection Clause of the Constitution because the statute protects the interests of a political tribal entity.[86] Congress clearly intended to avoid equal protection claims by drafting a triggering mechanism dependent on an individual's *citizenship*, not based on race or lineage.[87] Without an existing relationship between a tribal citizen and a Tribe, the provisions of ICWA do not apply to a state adoption action.[88] ICWA does apply in this case because Baby Girl is *eligible for membership* in the Cherokee Nation.[89]

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[85] S. REP. NO. 104-335, at 14 (1996) (rejecting the existing family exception doctrine as "completely contrary to the ICWA").

[86] *See* 25 U.S.C. § 1901; *see also United States v. Antelope*, 430 U.S. 641, 645 (1977) ("[F]ederal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications.").

[87] 25 U.S.C. § 1903(4); *see also Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 89-91 (1973) (holding that discrimination based on citizenship does not violate equal protection and further finding that Congress discriminates based on citizenship).

[88] 25 U.S.C. § 1903(3).

[89] *See Antelope* at 646; *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 635 (S.C. 2012).

The core issue in this case turns on the citizenship of Baby Girl, not on race.[90] Petitioners improperly treat Indian classifications as if they were racial and not political by focusing on individual parental rights.[91] The language of the statute simply does not support such an interpretation.[92] ICWA only applies when an Indian child (1) is an enrolled tribal member or (2) is eligible for enrollment and her parent is an enrolled tribal member.[93] Congress clearly intended to avoid a racial application of "Indian" in the statute's operating provision.[94] Petitioners' mischaracterization of ICWA and its coverage formula perpetuate a race-based notion of "Indian" – ignoring Indian Tribes as separate polities with fundamental sovereign interests in their citizens. The Court should follow congressional direction established in ICWA and recognize the Cherokee Nation's separate and independent sovereign interest in its citizens.[95]

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[90] *Espinoza*, 414 U.S. at 89-91.

[91] Brief for Petitioner at 3, *Adoptive Couple v. Baby Girl*, No. 12-399 (Feb. 19, 2013) ("The creation of parental and adoption-veto right from whole cloth under ICWA is based on race, unmoored to any legitimate federal interest in protecting existing tribal ties, culture, or self-government.").

[92] 25 U.S.C. § 1903(3)-(4).

[93] *Id.*

[94] *Id.* at § 1903(4).

[95] *See Talton v. Mayes*, 163 U.S. 376, 382-383 (1896) (holding that the source of Cherokee Nation's authority over its citizens was not federally delegated authority but a Tribe's inherent sovereignty).

CONCLUSION

Congress plainly recognized that Indian children are an essential resource to the survival of Indian Tribes. As such, Congress passed ICWA to ensure that Tribes retain an interest in Indian children entirely separate from that of individual parents. ICWA's plain language and legislative history leave no room for doubt that Tribes have a protected interest in any child custody proceeding, regardless of individual circumstances. Thus, the judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-399

IN THE
SUPREME COURT OF THE UNITED STATES

ADOPTIVE COUPLE, PETITIONERS
v.
BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, ET. AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE NAVAJO NATION AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Navajo Nation is a federally recognized sovereign Indian tribe within the borders of the United States of America, with its *Diné Bikéyah* (Navajoland) encompassing more than 27,000 square miles of land in the states of Utah, Arizona, and New Mexico, and with a population of over 250,000 members. The Appellant in this matter has raised issues challenging the Indian Child Welfare Act (the "Act") and its application among the states, which Act was promulgated in 1978 by the United States Congress on behalf of the United States of America for the benefit of hundreds of federally recognized Native American tribes residing within the borders of the country—one of which was the Navajo Nation. ICWA governs the rights of Indians and Indian tribes with regard to child welfare matters. The Navajo Nation maintains three (3) distinct intergovernmental agreements under 25 U.S.C.A. §1919 with the states of Arizona, New Mexico and Utah. As such, the Navajo Nation is directly impacted with regards to its own sovereign rights, as

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[1] The parties have filed blanket consents with this Court to allow for the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than the Navajo Nation and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The Navajo Nation filed this brief on its own behalf.

well as those of its members under any determination made by this Court respecting the Act.

STATEMENT OF PERTINENT FACTS

The Navajo Nation herein adopts the statement of facts as set forth in the *Brief for the Respondent Birth Father* and the *Brief for the Cherokee Nation* on file with this Court, but draws attention to the simplistic facts at issue here.

The unmarried father of Cherokee Nation heritage (the "**Father**") and mother of Hispanic heritage (the "**Mother**") conceived a child (the "**Child**") during their relationship. Pet. App. 2a-3a. The Father desired to be married to the Mother, but the relationship was terminated by the Mother prior to the Child's birth. *Id.* The Father texted the Mother what he believed to be consent to the Mother having custody. Pet. App. 4a, 126a; Trial Tr. 488-489, 535-536.

The Mother unilaterally ceased contact with the Father, contacted an adoption agency who located a couple in South Carolina (the "**Adoptive Couple**") who were interested in adopting the Child, and did not inform the Father. Pet. App. 4a-5a, 105a, 106a. The Mother's attorney sent notice to the Cherokee Nation in accordance with 25 U.S.C.A. §1912(a); however, such notice either advertently or inadvertently (this is disputed among the parties) misspelled the Father's name and provided his wrong birth day and year, causing the Cherokee

Nation to respond that the Father was not a member, even though he was. Pet. App. 5a-6a.

South Carolina law required notification to the Father 30 days prior to the final adoption hearing, contrasting ICWA's ten (10) day notice requirement under 25 U.S.C.A. § 1912 prior to *any* hearing being held regarding the Child's custody. When the Father received this notification, the Child was approximately four (4) months old, and Mother had relinquished her rights the day after the Child's birth. Pet. App. 7a. The Father immediately took action to pursue his rights to custody of the Child. Pet. App. 7a-8a. The Cherokee Nation was also informed, acknowledged the Father and Child as members, and intervened. Pet. App. 9a-10a. The immediate action by the Father and Cherokee Nation evidences that both would have become involved at the onset if either been properly notified under §1912 prior to *any* hearing being held. *Id.* DNA testing conclusively established paternity of the Father, and he contested the adoption. Pet. App. 10a, 119a-120a.

The South Carolina court heard the matter and, rather than applying ICWA and returning the Child to the Father, undertook a lengthy process of determining whether Father should be able to exert rights under ICWA. South Carolina law dictated the Father had no right to consent to the adoption because he had not financially supported the Mother during her pregnancy. ROA 16 (*citing* S.C. CODE ANN. §63-9-310(A)(5)). ICWA dictated that Father should have custody as a natural and fit parent of

the Child. ROA 19 (ICWA provided greater rights to Father), ROA 21 (no relinquishment), ROA 22-24 (no state grounds for termination of parental rights), ROA 24, 26 (no safety risk to child).

Ultimately, the South Carolina trial court determined that the Father was a "parent" under ICWA, having both acknowledged and established paternity through the DNA testing, entitling him to custody of the Child. ROA 18-19. Father was given physical/legal custody on December 31, 2011. Pet. App. 11a. The Adoptive Couple appealed, but the South Carolina Supreme Court affirmed the award of custody to the Father under ICWA. Pet. App. 1a-100a. The matter was then taken on certiorari review by this Court.

The Adoptive Couple has raised two issues in its opening brief challenging provisions of ICWA, namely, the ICWA definition of "parent" as it relates to unwed fathers' rights, and seeking adoption of a controversial "existing Indian family" ("**EIF**") doctrine, which is followed by seven states, but has been empirically rejected by twice as many, including the inception state. Father's Resp. Br. 36, fn. 12.

Numerous amicus curiae briefs are being submitted in this matter from states, tribes, professors of law, ICWA organizations, guardians ad litem, constitutional advocates and others in support of the South Carolina trial court and South Carolina Supreme Court's decisions to grant custody to the Father under ICWA. This rallying support evidences that ICWA has been embraced as the proper means

by which to protect Indian children's rights, as well as Indian parents and tribes.

SUMMARY OF THE ARGUMENT

ICWA accomplishes its intended purposes by subjecting states to certain aspects of tribal law and culture regarding child welfare, enabling tribes to continue in perpetuity rather than being mainstreamed into United States culture. ICWA has remained substantively unchanged since its inception and has created widespread change in the United States in favor of preservation of the Indian culture unique to this land. This Court has occasioned only once to hear a matter respecting ICWA in the 35 years of its existence, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989), and such matter upheld ICWA. This Court should do likewise here. However, since provisions of ICWA before this Court herein are regularly misinterpreted, helpful clarification and guidance in the process of affirmance will be assistive in avoiding continuing or future misinterpretations.

ICWA defers to tribal law for defining any part of an Indian child's family, even extended members. This is supportive of the differing clan structure of Indian families as well as the sovereign authority to regulate their own membership, which membership directly implicates ICWA in child welfare matters. Deferring to state law on the issue of "paternity" or to define "parent" is contrary to application of ICWA, and undermines a tribe's sovereign authority.

The EIF doctrine should be abolished as contrary to ICWA. The term "custody" under ICWA is not modified (i.e. "legal," "physical," "temporary," "permanent") and generally references varying types of "parental rights." Applying it otherwise severely limits the protection ICWA was intended to provide, particularly with regard to those it was created to protect: the children and thus perpetuity of the tribes. ICWA applies to all members of federally recognized tribes, but the EIF infuses state domestic law modifiers to limit application to only those children members who recently resided with a custodial Indian parent. The Navajo Nation membership/citizenship extends to all who are one-quarter Navajo, but the EIF doctrine nearly limits ICWA's application to only full-blooded Indian children or bases it on custodial relationships, negatively impacting domestic relations cases between an Indian parent and a non-Indian parent. ICWA is not intended to impact domestic relations cases. 25 U.S.C.A. §1903(1); H.R.Rep. No. 95-1386, p. 17. It was intended to apply to all members of federally recognized tribes. The EIF doctrine would create a chilling effect on domestic relations cases if the Adoptive Couple's reading of ICWA were accepted. It should be abolished as contradictory to ICWA.

ARGUMENT

The *Brief for the Respondent Birth Father* and the *Brief for the Cherokee Nation*, as well as several of the amici, have undertaken in-depth analyses of

ICWA and its history from their differing perspectives, evidencing just how solidly the Act's precepts can be applied to benefit the children of federally recognized Indian tribes in the United States. The Navajo Nation lends its support to each of these briefs that seeks to uphold ICWA, and will not present cumulative argument on those matters since the Navajo Nation is satisfied that they have been sufficiently covered by these parties and amici.

I. ICWA HAS APPLIED SINCE THE CHILD'S BIRTH TO ANY MATTERS RESPECTING CHILD'S CUSTODY; AND THE FATHER'S PARENTAL RIGHTS REMAIN INTACT.

The Adoptive Couple's theories disregard the tremendous progress ICWA has accomplished, and its benefit to millions of lives. Some tribes may have disappeared altogether in the last 35 years without ICWA, particularly if history had not been changed. Limiting application of ICWA under the Adoptive Couple's theories could bring about such disappearance in the near future. The Adoptive Couple's argument is particular to their difficult circumstances, but should not be found attributable to ICWA. While the Navajo Nation has sympathy for their loss of custody after two (2) years with the Child, the Adoptive Couple's attempt at impugning ICWA for such circumstance is misplaced.

The ICWA §1912(a) notice was deficient to validate the Father's membership in the Cherokee Nation; however, state law adoption notice ensured that these errors could not undermine the rights of

the Father, the Child or the Cherokee Nation. ROA 16 (*citing* S.C. CODE ANN. §63-9-310(A)(5)). Upon notice, actions were immediately undertaken by the Father contesting adoption, establishing paternity, and evidencing implication of ICWA. Once ICWA applies, it has a retroactive effect of nullifying any prior actions taken inconsistent with ICWA where the Child and the Father were both members of a federally recognized tribe. *See* 25 U.S.C.A. §1914 (invalidation of actions violating §1911, §1912, and §1913). ICWA did not "resurrect" the Father's parental rights which Adoptive Couple believe had been legally taken away by South Carolina law. ICWA applied from the time of the birth of the Child, and possibly even from conception—if actions during pregnancy are legally applicable to rights.

ICWA provides only three ways in which an unwed Indian father's parental rights can be extinguished: evidence beyond a reasonable doubt supporting termination of parental rights under §1912(f), relinquishment with limited revocation rights under §1913, and the lack of "acknowledgment or establishment of paternity" by an unwed father under the defined term of "parent" in §1903(9). None of these have occurred to deprive the Father of his parental rights herein. The Adoptive Couple's consistent misapplication of South Carolina law in each of their arguments contravenes the highest authority of that state, which properly refused to apply their own state law to this matter since ICWA applies when an Indian child is involved—even when no biological parent is involved.

II. "ACKNOWLEDGMENT OR ESTABLISHMENT" OF "PATERNITY" TO DEFINE "PARENT" UNDER ICWA SHOULD BE DEFINED BY APPLICABLE TRIBAL LAW GOVERNING FAMILIAL RELATIONS, NOT STATE LAW.

The Adoptive Couple challenges Father's "parent" status seeking to eliminate application of ICWA; however, they never address ICWA's application based on the Child's eligibility for membership in a tribe. 25 U.S.C.A. §§1903(4), 1912(a). Even absent the Father's tribal status or eligibility for "parent" status under ICWA, the Cherokee Nation would still extend membership to the Child and exercise its own rights independently, both of which implicate ICWA's application. 25 U.S.C.A. §§1903(4), (5) and (8), 1911(c), and 1912(a).

Applying tribal law to "acknowledgment or establishment of paternity" for ICWA's definition of "parent" is appropriately aligned with other provisions of ICWA—and its underlying intent to infuse tribal law and customs particular to family relations—into child welfare matters involving Indian children. The Navajo Nation maintains its own tiered judicial system, with the highest court being that of the Navajo Nation Supreme Court (the "NNSC"). The NNSC has opined how unique Navajo culture intertwines with the judicial system to determine matters of both paternity and Indian family. The tribal concept of "parent" or "paternity" or "family" were the basis for the mandates contained under ICWA, as shown more particularly

post. In accepting the South Carolina Supreme Court's determination to apply ICWA rather than state law, tribal law is also presumptively applied.

Congress intended tribal law to be applied in defining family relations. *See, e.g.,* 25 U.S.C.A. §1903(2). Tribes are vested with sole authority to regulate membership or citizenship in their own tribes in exercise of their sovereign powers. *See, e.g., Martinez v. Southern Ute Tribe*, 249 F.2d 915, 920 (10th Cir. 1957), *cert. denied* 357 U.S. 924, 78 S.Ct. 1374, 2 L.Ed.2d 1376 (1958)("a tribe has complete authority to determine all questions of its own membership as a political entity.") The Navajo Nation's laws provide automatic membership to individuals—including children—who are at least one-quarter Navajo. *See,* 1 N.N.C. § 701. Those who marry a Navajo and reside in Navajoland are considered *hadane* or in-laws, "connected by rights and obligations" to the spouse's clan; however, "being 'hadane' does not make one Navajo." *See, Means v. Navajo Nation*, 342 F.3d 924, 927 (9th Cir. 2005)("**Means**"). Further, legal determinations of "paternity" do not require genetic testing in the absence of a dispute.

Tribes' sovereign powers to regulate membership would be frustrated if state law governed "paternity" or required an "existing Indian family" to extend any protections under ICWA. Tribal membership would no longer apply to protect a member under ICWA based on state refusal to recognize them as a "parent." States could create

laws in contravention of 25 U.S.C.A. §1921 (state law only applies if "a higher standard of protection is provided") to eliminate parental rights altogether under ICWA. Tribal membership to implicate ICWA would cease to be the prerogative of the sovereigns, extinguishing sovereign authority. If tribes cannot govern membership to an extent where federal protections are applied to those members, then Indian culture will cease. ICWA was created to avoid these domino effects.

It is thus more appropriate to apply tribal law to determine familial relations under ICWA. ICWA supports this. The only definition contained in ICWA regarding "family" is under "extended family members" which specifically defers to tribal law. 25 U.S.C.A. §1903(2)(" 'extended family member' shall be as defined by the law or custom *of the Indian child's tribe...*" (emphasis added)). When there is no tribal law or custom that applies, ICWA refuses to default to state law, instead attempting to define the term according to tribal culture. *See,* 25 U.S.C.A. §1903(2) ("...or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, neice or nephew, first or second cousin, or stepparent;..."). Why would ICWA apply tribal law or custom to determine who is an "extended family member" but not to determine who has acknowledged or established paternity to be a "parent"? It is commonsense for ICWA to defer to tribal laws on family relations, including the actions

necessary to acknowledge or establish those family relations. The NNSC maintains precedent on the determination of paternity with regard to its members and citizens. However, Navajo culture differs greatly from mainstream America and, as noted in ICWA's definition of "extended family members," the NNSC resorts to application of customs for the specific purpose of ensuring the best interests of the children are upheld and protected.

A. The Unique *Diné* Culture.

It is necessary to explain the uniqueness of the Navajo culture and its impact on the governing laws in Navajoland. The Navajo culture is founded upon principles of *K'é* (respect) and *Hozho'* (harmony).

> The Navajo concept of k'é defines a peaceful and harmonious relationship which respects the present and future well being of the person. At the core of retaining k'é is maintaining respect for others, particularly respect in one's use of words in talking about others. Respectful use of one's words requires the reservation, circumspective or complete avoidance of judgmental characterizations of others which overly-broadly designate a certain negative trait across a wide timeframe, or which inaccurately and negatively characterize a single negative trait of a person to be the permanent, complete and unchanging character of a person. The understanding is that when one fails to properly exercise respect by engaging in these

> types of inaccurate characterizations of another person, he or she risks endangering the future wellbeing of the person, the person's family and the community (a network of interrelated families) creating conditions which may be conducive towards maintaining or exacerbating the existence of such characteristics.

Baldwin v. Chinle Family Court, 7 Am. Tribal Law 643, 2008 WL 5444666 (Nav. Sup. Ct. 2008). *Hozho'* is the result of living a life that promotes *k'é*, which places a responsibility upon others in dictating the way they should conduct themselves with all others in their Navajo community. *Id.* This concept protects families from being presumptively subject to future limitations on their rights based solely on inaccurate and negative characterizations, and instead engenders a focus on meeting the standard of proof required when custody issues arise. *Id.* Otherwise, it would be contrary to the concept of *k'é* and contrary to the goal of achieving *hozho'*, which is likewise contrary to the Child's best interests. Under the Navajo Nation's unique *Diné* law, "our children are the most valuable gift of creation" to our clans and overall community. 9 N.N.C. § 1702(A).

In the Navajo journey narratives, it is said that the breath of life enters the child at the moment of conception and produces the movement or *hiná*, which is the life and eventually growth of the fetus. An expectant Navajo mother is said to relive the creation story as she prepares to welcome an "earth

surface" baby girl or boy into the world. The child, even an unborn child, is described as holy or sacred, although neither of these words convey the child's status accurately. The child is considered alive at conception and the umbilical cord is the life line.

B. Cultural Influence on Tribal Laws.

Navajo common law provides a right to know precisely where one has originated. *Davis v. Means*, 7 Nav. R. 100, 103 (Nav. Sup. Ct. 1994)("**Davis**"). "Knowing one's point of origination . . . is extremely important to the Navajo People, because only then will a person know which adoone'e (clan) and dine'e (people) the person is." *Id.* These precepts are essential to a Navajo's identity and must be known for Navajo religious ceremonies to seek *hozho'* (harmony and peace), which to a child is emotional, physical and spiritual well-being. *Id.*

"Navajo common law on the family extends beyond the nuclear family to the child's grandparents, uncles, aunts, cousins and clan relationships . . . [t]he importance of his relatives to the Navajo can scarcely be exaggerated." *Davis* at 103. "In Navajo culture and tradition, children are not just the children of the parents but are children of the clan." *Goldtooth v. Goldtooth*, 3 Nav. R. 223, 227 (W.R. Dist. Ct. 1982); *see also In re Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983). The NNSC has stated as follows:

> By "knowing one's point of origin," the Court was addressing the right of the child for

> meaningful continuation of relationships according to ak'éí (kinship). In order to know who they are and their place within the world, a child must be given the opportunity to grow up within familial and clan relationships. A child must have "meaningful contact" and "meaningful visitation" with his or her relatives, culture and people in order to know his or her place in the entire clan and extended family.

In re Guardianship of T.S.E.J., Sandoval v. John, 10 Am. Tribal Law 57, 2011 WL 3625086 (Nav. Sup. Ct. 2011)(further citations omitted)("Sandoval"). Parental decisions must consider "the child's relationships with other family members." *Id.* A relationship with both sets of grandparents is crucial for passing on knowledge of Navajo tradition. Navajo children are viewed as the future, ensuring the existence and survival of the Navajo people in perpetuity. *Burbank v. Clarke*, 2 Am. Tribal Law 424, 7 Nav. R. 369, 371 (Nav. Sup. Ct. 1999). "[T]he primary consideration is the child's strong relationship to members of an extended family . . . Therefore the court looks to that tradition and holds that it must consider the childrens' place in the entire extended family in order to make a judgment based upon Navajo traditional law." *Goldtooth* at 225-226.

The Navajo court must always act as the parent of the child and in the best interest of the child, especially where a change of custody is

requested. *Barber v. Barber*, 5 Nav. R. 9 (Nav. Ct. App. 1984). A Navajo court must seek to serve the interests of the child as being above the interests of the adults. *Lente v. Notah*, 3 Nav. R. 72, 78-79 (Nav. Ct. App. 1982). Court involvement does not cease until the safety, well-being, and best interest factors are satisfied to provide the child meaningful contact with his or her relatives and culture. Continued and meaningful contact between the relatives and child survives a grant of custody to the parent. *See, In re A.M.C.*, 8 Nav. R. 825, 828 (Chinle Dist. Ct. 2004); *In re A.M.C.*, 8 Nav. R. 874, 884 (Chinle Dist. Ct. 2005). Visitation is provided with extended family. Courts are held responsible under the Canon Three of the Navajo Nation Code of Judicial Conduct when they fail in their duty to achieve prompt, efficient and fair resolution to disputes, particularly where a child is left to grow and form attachments to caregivers who keep them from their relatives, culture and heritage. *See, e.g., In the Matter of A.M.K.*, 9 Am. Tribal Law 191, 2010 WL 4159270 (Nav. Sup. Ct. 2010).

C. Navajo Law on "Acknowledgment or Establishment" of Paternity.

The Adoptive Couple has challenged the definition of "parent" under 25 U.S.C.A. §1903(9), seeking to define the phrase "where paternity has not been acknowledged *or* established" under state law excluding consent for lack of an unwed father's financial support during pregnancy. *Ibid.* (emphasis added). To provide this Court assistance on determination of this matter with deference to tribal

law, the NNSC maintains precedent on what it means to "acknowledge" or "establish" paternity and what is required under Navajo law.

The governing NNSC case on this matter is *Sandoval, supra.* Therein a mother passed away leaving four (4) children without a custodian. *Id.* The father, John, stipulated to Sandoval (the maternal grandmother) having custody, and John sought only visitation. *Id.* The pleadings, evidence and reports did not dispute John was the natural father, with Sandoval testifying that the children "know who their father is." *Id.* John acknowledged paternity in open court, and no other person was alleged to be the father of the children. *Id.* John's name appeared on the birth certificate of the second oldest child and on two New Mexico *Acknowledgment of Paternity* forms for the two youngest children, but he had not signed these, although they had been signed and notarized by the mother prior to her death. *Id.* Three of the four children carried John's last name. *Id.* The home study and the guardian ad litem report both identified John as the natural father, raising no safety or other issues negatively impacting his contact with the children. *Id.* The guardian ad litem recommended liberal visitation, and Social services recommended no limitation on visitation. *Id.*

However, at the final hearing but contrary to her position[2], the court-appointed guardian ad litem,

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[2] Under Navajo law a guardian ad litem is not authorized to advocate on the child(ren)'s behalf as a lawyer, but is considered a "spokesperson."

who was an attorney and a former judge, advocated and insisted on genetic testing. *Id.* Sandoval testified of a telephone call between the mother and John about his refusal to claim paternity over the two youngest children, and confirmed that John's name was not on three of the children's birth certificates. *Id.* John countered that he had been advised by a criminal lawyer not to sign the acknowledgements of paternity forms, but indicated he desired to do so now. *Id.* The trial court ordered John to undergo genetic testing on all four children so paternity could be established "once and for all." *Id.* John appealed and obtained a stay of the testing pending appeal. *Id.*

The NNSC found that, "our laws do not require the use of testing in the absence of a dispute; nor do our laws prohibit temporary custody or visitation to be awarded on the basis of presumptions." *Sandoval, supra.* Under Navajo common law, paternity is determined under either rebuttable presumption or legal determination for temporary custody/visitation awards, or only by legal determination for permanent custody/visitation awards. *See, e.g., Sombrero v. Hon. Angela Keahnie-Sanford*, 4 Am. Tribal Law 674, 8 Nav. R. 360 (Nav. Sup. Ct. 2003). In *Sandoval* the NNSC stated that, "[a]s to an unmarried man, 'the court may apply presumptions of paternity,' and 'should weigh all the evidence presented, including rebuttals to the presumption.'" *Ibid.*, citing *Davis v. Crownpoint*, 8 Nav. R. 279, 286 (Nav. Sup. Ct. 2003)("Crownpoint"). "[P]resumptions may be established by looking to all

factors in the best interest of the child, such as a parent-child relationship, and other evidence." *Id.*

The NNSC found that "a father's written acknowledgement of paternity is considered a legal finding of paternity without further findings necessary" since such is sufficient to establish parentage in the Navajo Nation Office of Hearings and Appeals. *Sandoval, supra*, citing *Crownpoint* at 286, citing N.M.S.A. §4-11-15 (1978). "Where the alleged absent parent has voluntarily stipulated to or acknowledged paternity and the claim is not rebutted, we state uncategorically that judicial time and resources may not be unnecessarily spent in further investigation, including testing." *Id.* "Such an acknowledgement creates a presumption of parentage pursuant to which a legal determination of paternity may be made absent rebuttal." *Id.* "[W]e hereby hold that our courts are required to treat the administrative establishment of paternity as conclusive without further ado, since it is expressly provided for in our statutory law." *Id., citing* 9 N.N.C. § 1701 et. seq.

The NNSC explained its position in *Sandoval* on the question of paternity as follows:

> It is in the best interest of children to have knowledge of their father and to be able to point to him as someone who desired to be their father without needless raising of questions of paternity that serve only to shake the stability of the family. Our courts must ensure a child does not consider himself or

> herself wótashke' (fatherless child). In this case, where only one man has stood up to be the children's father and, furthermore, has been taken to be the father by the mother and family, the Court has no business investigating further if the result would be to render that child fatherless.

Sandoval, supra. The NNSC acknowledged a similar finding in the case of *In re Parentage of Liam J.H.*, 119 Wash. App. 1019 (Wash. App. Div. 1, 2003) where the Washington appellate court nullified the paternity test that proved Sean G. was not Liam's biological father because no one disputed Sean G.'s paternity. *Id.* The Washington appellate court stated as follows:

> The best interests of the child standard does not entitle a court to presume that paternity determination is automatically in the child's best interest. Therefore, absent a showing that such determination is in fact within the child's best interests, this standard cannot be invoked on behalf of someone other than the child.

Sandoval citing *Liam* at 1031. The NNSC stated that Navajo courts should strive to keep families intact and prevent creation of situations in which a child is left without a family. *Id.*

In *Sandoval* the NNSC found that the evidence "overwhelmingly creates a presumption that Appellant is the father of the children." *Ibid.*

This presumption would be similar to an "acknowledgment" of paternity under ICWA's §1903(9). In Indian law, evidence towards a rebuttable presumption of paternity is akin to "acknowledgment" and supports an award of temporary custody and visitation. It is thus supportive of the concept that the person be afforded status as a "parent." If a legal "acknowledgment" is actually filed, it is considered a legal determination supporting permanent custody.

In *Sandoval*, John had "plainly rebutted allegations that he denies his parentage," asking permission to sign acknowledgments of paternity, and NNSC finding that he should be allowed to do so. In the instant case, the Father also plainly rebutted the allegations that his alleged text message to the Mother forfeited his parental rights to the Child, by pursuing DNA testing and pursuing an award of custody immediately upon receiving notice of the adoption.

In *Sandoval*, the NNCS cited evidence that three children carried John's last name, his name was on one birth certificate, the mother acknowledged his paternity before her death, he acknowledged his paternity in open court, and the family and the children took him to be their father. *Ibid.* The NNSC found the trial court had abused its discretion for (1) discounting this evidence of paternity, (2) requiring testing in the absence of dispute "when such a conclusive standard is not required," and (3) failing to consider "the disabilities

of being wótashke' (fatherless child)." *Id.* The use of "disabilities" connotes that a child's deprivation from a fit parent seeking custody impairs the child.

If "paternity" is utilized to limit the term "parent" under §1903(9), and thereby application of ICWA's protections to actual members of federally recognized tribes, then state law should not govern any more than it governs the sovereign right to determine membership. Tribal law should apply to determining whether "paternity" has been acknowledged and/or established without reference or subjection to limitations contained in state law. This properly supports 25 U.S.C.A. §1911(d) (providing full faith and credit be given to judicial proceedings of any Indian tribe). States should be subject to the tribal determinations of family relations, including defined terms of "parent" or "paternity" as ICWA intended.

D. Adoptive Couple's Theory Has No Basis in State Law or Tribal Law.

Section 25 U.S.C.A. §1903(9) confers the status of "parent" to an unwed father if he "acknowledges" or "establishes" paternity. The Adoptive Couple seeks an exception to this provision based on South Carolina law that pertains to consents required for adoptions. This theory is not technically based in the South Carolina paternity laws. *See,* S.C. CODE ANN. §63-17-10, et. seq. (laws governing establishment of paternity). Thus, neither South Carolina law nor ICWA supports Adoptive Couple's novel theory. Nonetheless, the Father

herein conclusively established the biological relationship through genetic testing on May 10, 2010, and it has been acknowledged by the Adoptive Couple that he is the father. Pet. App. 10a. Thus, the Father both "acknowledged" and "established" paternity, and is thus a "parent" as it pertains to ICWA, nullifying application of South Carolina law.

Tribes' unique concept of family warrants deference by the state courts. This was the purpose for which ICWA was created and infused with tribal laws and customs, to which ICWA defers for defining family relations. Adoptive Couple tries to argue that "parent" somehow requires subjection to state law. Under most state laws, the tribal law concept of "acknowledgment" which includes evidence towards a presumption of paternity would be insufficient, particularly with regard to unwed fathers. Section 1903(9) meant to afford "parent" status with "acknowledgment" OR "establishment," but most state laws support only the latter with regard to determining paternity. Tribal law considers both, which is why ICWA considers both. Applying state law would defeat "acknowledgment" and focus only on conclusive "establishment" with strict timelines. Applying §1903(9) with reference to Cherokee Nation law would be appropriate for determination of whether the unwed Father herein had "acknowledged" or "established" paternity since it is his membership in that federally recognized tribe that implicates ICWA's application to the matter.

III. THE EIF DOCTRINE CONTRADICTS ICWA.

The EIF doctrine as created by the Kansas Supreme Court in 1982, *In re Adoption Baby Boy L.*, 643 P.2d 168, 175 (1982), and then rejected by the same court in *In re A.J.S.*, 204 P.3d 543, 549 (Kan. 2009). The core idea of the doctrine is that the Indian child needs to have recently resided with the Indian parent or in an Indian family to invoke the protections of ICWA. Adoptive Couple argues in favor of the EIF under ICWA provisions that speak about "custody," or what they perceive to be a prerequisite factor for its application. This interpretation would automatically exclude all removals from the hospitals at birth, creating a chilling effect by depriving tribes and Indian parents of added protection for all newborns, contrary to Indian customs and views of family where newborns are considered holy or sacred to their tribes.

The "custody" provisions of ICWA regarding Indian parents instead pertain to a right to exercise parental rights. The plain meaning[3] of the word "custody," is "[t]he care and control of a ... person." *Black's Law Dictionary* 267 (6th ed. 1991). The term "custody of children" further adds "[t]he care, control

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[3] "In determining the meaning of a statute, 'we look first to its language, giving the words used their ordinary meaning.'" Levin v. United States, 133 S. Ct. 1224, 1231 (2013), *citing* Moskal v. United States, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990) (citation and internal quotation marks omitted).

and maintenance of a child..." *Id.* at 287 (emphasis added). The "care" and "control" aspects are not further defined, except by the addition of outside modifiers such as "joint," "sole," "legal," "physical," "temporary," or "permanent," which then provides a definition of "custodial rights." However, "custody" rights in and of themselves are not exclusive to any one kind, but embody the entire concept of "parental rights" no matter what type of "custody" rights one maintains.

"Custody" rights, or parental rights, under ICWA are maintained by all biological parents or Indian custodians who have not (1) had their rights judicially terminated, (2) relinquished their rights, or (3) failed to acknowledge or establish them. This properly harmonizes[4] the defined term "parent" with the concept of "custody" or parental rights, as well as with the only extinguishing factors for such rights under 25 U.S.C.A. §§1903(9), 1912(f), and 1913. ICWA was meant to reach all of these "parents" of Indian children through use of the *un*modified word "custody." "Custody" rights should not be confused with "custodial rights" which require modifiers.

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[4] This Court held in Food & Drug Admin. v. Brown & Williamson Tobacco Corp. that it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall ... 'symmetrical and coherent regulatory scheme,' ... and 'fit, if possible, all parts into an harmonious whole...'" *Ibid.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 1301, 146 L. Ed. 2d 121 (U.S.N.C. 2000)(citations omitted).

Instead "custody" is the "right to care, control, and maintenance of a child" or more simply "the right to exercise parental rights" of differing kinds.

Adoptive Couple argues that §1912(f)'s verbiage that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" requires a "preexisting Indian family" to have "continued" custody. The *Brief for the United States as Amicus Curiae Supporting Affirmance* (the "U.S. Amicus") argues that prospective legal and physical custody does not meet the criteria of "continued," which "means there must have been some form of custody in the past that could be 'continued.'" *Ibid.* at 24. The U.S. Amicus and Adoptive Couple read "custody" as "custodial rights" which requires a modifier. Such modifiers are deliberately absent in ICWA since they are based in mainstream domestic law's custodial/noncustodial or legal/physical concepts of "custody." The U.S. Amicus refuses to read §1912(f) as excluding the word "continued," but infuses modifiers for "custody" into the statute by requiring "custody" to be defined by a prior "legal/physical" determination. Nothing in ICWA resorts to these state domestic law modifiers. Requiring a preexisting legal/physical custody would automatically exclude ICWA protection for all Indian children removed at birth, as well as all noncustodial Indian parents, and ultimately tribes themselves.

Reading the term "custody" as "parental rights" throughout the provisions raised by the

Adoptive Couple upholds the Congressional intent as well as the historical application of ICWA. Section 1912(f) would read "the continued [parental rights] by the parent or Indian custodian [are] likely to result in serious emotional or physical damage to the child." Given §1912(f) applies to terminations, this supports the underlying concept of a permanent severance of the parent-child relationship.

Adoptive Couple interprets 25 U.S.C.A. §1913(b) for voluntary withdrawals of consents to foster care placements to apply only to preexisting custodial parents where it states "the child shall be returned to the parent or Indian custodian." However, "parent" includes unwed fathers who have acknowledged/established paternity, not just preexisting legal/physical custodians. 25 U.S.C.A. §1903(9). If one parent voluntarily consented to placement in foster care, another fit "parent" as defined in §1903(9) could come forward and exert their rights to custody.

25 U.S.C.A. § 1914 says "any parent or Indian custodian from whose custody the child is removed" may invoke that section to overturn prior orders or actions that violated §1911, §1912, or §1913. The proper definition of "custody" provides that any infringement upon the parental rights of "any parent or Indian custodian" as those terms are defined could seek relief thereunder. The Adoptive Couple's analysis to exclude noncustodial parents would severely impact tribal members, and allow ICWA to effectuate changes in domestic relations cases

involving an Indian parent, which ICWA was not intended to affect. 25 U.S.C.A. §1903(1); H.R.Rep. No. 95-1386, p. 17. The Adoptive Couple's argument to exclude noncustodial parents would alter not only ICWA application, but also domestic law and child welfare. Acknowledging the plain meaning of the word "custody" avoids this widespread impact that Congress did not intend.

Under 25 U.S.C.A. §1916, the plain meaning of "custody" provides that, whenever an adoption has been overturned, "a biological parent or prior Indian custodian may petition for return of [parental rights]..." Section 1916 also limits application of any state law to this provision by indicating these provisions are "[n]otwithstanding State law to the contrary..." so application of a domestic law modifier to the concept of "custody" would be contrary and thus not applicable. *Ibid.*

Under 25 U.S.C.A. §1916(b), adoptive placement preferences apply "except in the case where an Indian child is being returned to the parent or Indian custodian from whose custody the child was originally removed." A proper reading applies this section to those whose parental rights have been infringed upon by removal. Adoptive Couple's reading would place a fit noncustodial parent as a nonpreferential placement, leaving children in foster care if they could never be returned to the previously "custodial" parent. This is not providing greater protection. Similarly, under 25 U.S.C.A. §1920, clarification of "custody" would apply its precepts to

all Indian parents and Indian custodian where improper infringement upon parental rights has occurred.

The EIF contradicts ICWA and creates limitations on its application that would have chilling effects upon ICWA and domestic law cases contrary to Congress' stated intention. 25 U.S.C.A. §1903(1): H.R.Rep. No. 95-1386, p. 17. This Court should bring an end to further application of the EIF, just as its creators have, through clarification of the word "custody" in the provisions mentioned *supra* so as to avoid future misinterpretations affecting millions of lives.

IV. FEDERAL RECOGNITION OF INDIAN STATUS IS POLITICAL.

This Court has held, in the context of Indian employment preferences by the federal government, that "federal statutory recognition of Indian status is 'political rather than racial in nature.'" *Means, supra* at 932, citing *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). "Legislation that singles out Indians for particular and special treatment is in a special category because of the historical relationship of the United States with the Indians and the Indian Commerce Clause, and 'as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.'" *Id.* at 932-933, citing *Mancari,* 417 U.S. at 551-55, 94 S.Ct. 2474. *Means* noted that courts are bound by *Mancari* even outside its context. *Id.*

ICWA "singles out Indians for particular and special treatment" with that treatment rationally tied to Congress' obligation towards ensuring that Indian tribes do not become nonexistent. *Means* at 932-933. The Adoptive Family raises no viable analysis that supports abrogation of this Court's prior precedent.

CONCLUSION

WHEREFORE, based upon the foregoing, the Navajo Nation respectfully requests this Court decline to grant the relief requested by Adoptive Couple and uphold ICWA as constitutional, while providing guidance to the state courts on its proper application in circumstances such as these.

DATED this 26th day of March, 2013.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-399

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF *AMICUS CURIAE* FOR THE OKLAHOMA INDIAN CHILD WELFARE ASSOCIATION SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether the South Carolina courts properly applied the Indian Child Welfare Act of 1978, 25 U.S.C. §1901 *et seq.*, to award custody of an Indian child to her biological father over an adoptive couple, where the father acknowledged and established paternity and no remedial measures had been taken to avoid the termination of father's parental rights.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Oklahoma Indian Child Welfare Association, Inc. (OICWA whose membership list reflects 100% of Oklahoma's 38 federally recognized tribes[2] including: Absentee Shawnee Tribe of Oklahoma, Alabama Quassarte Tribal Town, Apache Tribe of Oklahoma, Caddo Nation, Cherokee Nation, Cheyenne-Arapaho Tribes, Chickasaw Nation, Choctaw Nation of Oklahoma, Citizen Potawatomi Nation, Comanche Nation, Delaware Nation, Delaware Tribe of Indians, Eastern Shawnee Tribe of Oklahoma, Fort Sill Apache Tribe, Iowa Tribe of Oklahoma, Kaw Nation, Kialegee Tribal Town, Kickapoo Tribe of Oklahoma, Kiowa Tribe of Oklahoma, Miami Tribe of Oklahoma, Modoc Tribe of Oklahoma, Muscogee (Creek) Nation, Osage Nation, Ottawa Tribe of Oklahoma, Otoe-Missouria Tribe of Indians, Pawnee Nation of Oklahoma, Peoria Tribe of Indians of Oklahoma, Ponca Tribe, Quapaw Tribe of Oklahoma, Sac & Fox Nation, Seminole Nation of Oklahoma, Seneca-Cayuga Tribe of Oklahoma, Shawnee Tribe, Thlopthlocco Tribal Town, Tonkawa Tribe of Oklahoma, United Keetoowah Band of Cherokee Indians in Oklahoma, Wichita and

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel makes a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief through letters of consent on file with the Clerk of this Court.

[2] Oklahoma Indian Child Welfare Association Membership List (2013) (on file with the OICWA office, Shawnee, OK).

Affiliated Tribes (Wichita, Keechi, Waco and Tawakonie) and the Wyandotte Nation.

OICWA tenders this brief from the perspective of the Oklahoma tribal child welfare worker. *Amicus'* expertise in implementing the Indian Child Welfare Act, 25 U.S.C. §§1901 *et seq.* ("ICWA") in both voluntary and involuntary child custody proceedings involving Indian children will assist the Court in evaluating the important issues presented in this case.

These Oklahoma tribal child welfare workers are the force on the ground with respect to day-to-day implementation of tribal child welfare laws, and the ICWA. Many of these tribal child welfare workers have devoted their entire careers in their respective tribal child welfare departments.

OICWA's preamble sets forth that OICWA's membership subscribes to the findings of the United States Congress relating to the enactment of the ICWA: to-wit; there is no resource more vital to the continued existence and integrity of Indian tribes than their children. OICWA further subscribes to the findings of the United States Congress that it is in the best interests of Indian children to be protected within their families and tribes, and that the stability and security of the Indian tribes and their families is to be promoted by ICWA.[3] In addition, OICWA's

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[3] Oklahoma Indian Child Welfare Act, By-Laws, Preamble (August 11, 2006) (on file with the OICWA office, Shawnee, OK).

purpose is to prevent cruelty to Indian children by providing training to persons and agencies dealing with Indian children especially in instances where the Indian child has been removed from his or her family.[4]

Oklahoma has been home to American Indians since well before the arrival of Europeans. C. Blue Clark, *Indian Tribes of Oklahoma: A Guide*, 3 (Univ. of Okla. Press 2009). Historically, tribal sovereignty was consistently under attack and tribes were dealing with cultural assault, as schools and missions took children away from the tribes. *Id.* at 14, 15. Reform slowly began in the years after World War I, but it was not until the passage of the Indian Child Welfare Act in 1978 when significant efforts were made to preserve Native American families and their tribal and cultural identities. *Id.* at 16.

Each of Oklahoma's 38 federally recognized Indian tribes has a unique cultural and historical background. The majority of these Indian tribes were forcibly removed to Oklahoma. Each tribe has its own kinship tenets and child rearing traditions. Tribal familial relationships are often complex and are very often misunderstood or unappreciated by state agencies.

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[4] Oklahoma Indian Child Welfare Association, Articles of Incorporation, A, Article III (1984) (on file with the OICWA office, Shawnee, OK).

OICWA tribal child welfare workers are grounded in the knowledge of their respective tribe's customs, traditions, kinship structure and child rearing practices. Tribal child welfare workers engage daily with Oklahoma Indian children and work hard to keep those children safe, foster their families and promote the sovereignty of Oklahoma tribes. OICWA tribal child welfare workers navigate state, tribal and CFR[5] courts inside Oklahoma and throughout the 50 states in both voluntary and involuntary child custody proceedings involving Indian children. Much of this work is through the remedial provisions set forth in ICWA. 25 U.S.C. §1912(d). OICWA tribal child welfare workers often testify in state courts regarding active efforts, remedial and rehabilitative measures, and whether the services were successful. Additionally, these tribal child welfare workers may testify as an expert witness in some cases pursuant to 24 U.S.C. §1912(e).

SUMMARY OF ARGUMENT

Pursuant to its plenary power, *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 529, 531 n.6 (1998); *see United States v. Lara*, 541 U.S. 193, 200, 202 (2004); *Morton v. Mancari*, 417 U.S. 535, 551, 552 (1974), the United States Indian Commerce Clause, U.S. Const. art. I, §8, cl.3; The Treaty Clause, U.S.

[5] Court of Federal Regulation, 25 C.F.R. §11.1 *et seq.*

Const. art. II, §2, cl.2; *Lara*, 541 U.S. at 200 (citing *Mancari*, 417 U.S. at 552); *see also United States v. Kagama*, 118 U.S. 375, 379, 380 (1886); *Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996), Congress enacted the ICWA at a time when 25% to 35% of Indian children were being removed from their families and the adoption rate for Indian children was 8 times that of non-Indian children. Approximately, 90% of the Indian placements for these Indian children were in non-Indian homes. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 33 (1989) (footnote and citations omitted). The ICWA is based upon the fundamental assumption that it is in the best interest of the Indian child for the tribal relationship to be protected.

The ICWA sets forth federal minimum standards for the removal of and placement of Indian children by state courts. 25 U.S.C. §1902. Congress believed that the ICWA would eliminate many of the subjective state standards regarding the best interest of the Indian child that led to the shameful situation that existed prior to the ICWA. ICWA's objectives are best served by tribal child welfare input regarding tribal child rearing practices, providing tribal services and ICWA's placement preferences.

OICWA tribal child welfare workers are entrenched in their tribal communities. The vast majority of OICWA tribal service providers are members of Indian tribes or extensively familiar with the tribal community norms in which they work. Long time tribal child welfare workers reported witnessing the

harm that resulted from some non-Indian placements of Indian children who had reached adulthood. These Indian adults returned home to their tribes expressing a desire to know their Indian families and communicating a feeling of never really fitting in with the non-Indian adoptive family. This corroborates the substantial evidence that separation of Indian children from their tribes and natural families often caused serious harm as the children got older. S. Rep. No. 95-597, at 43 (1978). *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, at 32-34 (1989) (footnotes and citations omitted).

A. Determination whether a child is an Indian child is the first predicate in determining whether a case is an ICWA case. 25 U.S.C. §1903(4). However, many OICWA tribal child welfare workers report numerous delays in this stage of the ICWA analysis. The delays result from imprecise, incomplete information being sent to the tribal enrollment department requesting a finding of whether or not an individual is a member or eligible for membership. Determining membership is a critical first step in the ICWA analysis. Courts and attorneys must make it a priority to conduct thorough investigations into the Indian heritage of a child and provide complete and accurate information to the tribe for a determination of membership. Once a tribe determines an Indian child's membership or eligibility of membership, the next predicate for an ICWA application is whether the case is a child custody proceeding as defined by the ICWA. 25 U.S.C. §1903(1). The South Carolina court

found that the two predicates were satisfied in this case and properly applied the ICWA. Pet. App. 13a (majority); Pet. App. 59a (dissent).

B. Once the court determines that ICWA applies, ICWA notice provisions should be initiated. 25 U.S.C. §1912(a). Notice of involuntary proceedings must be given to the parents or Indian custodian and the Indian child's tribe.[6] *Id.* Notice to the tribe ultimately alerts the tribal child welfare worker that there is a tribal family in need and the worker begins to implement a plan, oftentimes collaborating with the state child welfare worker, to evaluate need and to tailor a service plan for each family. Delayed notice may circumvent the tribe's ability to offer tribal services to the family.

C. Oklahoma tribes vary widely with respect to the types and number of tribal services available to families. Generally, Oklahoma tribes may offer services such as parenting classes, substance abuse assessment and treatment, medical treatment, childcare and housing.

D. If remedial and rehabilitative services to the family are not successful, ICWA's presumptive

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[6] Additionally, Oklahoma law requires notice to tribes in voluntary child custody proceedings involving an Indian child "regardless of whether or not the children involved are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated." Okla. Stat. Ann. tit. 10 §40.3, 40.4 (1982).

placement preferences guide the state court with respect to the best interest of the Indian child in foster care, preadoptive and adoptive placements. 25 U.S.C. §1915. In *Holyfield*, this Court noted that the most important substantive requirements imposed on the state courts were the placement preferences set out in 25 U.S.C. §1915(a). *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 36, 37 (1989).

Based upon extensive testimony regarding the devastating impact on tribes as a result of state abuses, Congress carefully designed the ICWA placement preferences to promote an Indian child's continued connection to her tribe's cultural ties. A primary objective of the placement preference section is to prohibit state courts from imposing value judgments of the non-Indian community. Section 1915 also allows tribes to change the order of the placement preferences by resolution as long as the placements are the least restrictive alternative for the child. 25 U.S.C. §1915(b). To date, 35 of Oklahoma's 38 federally recognized tribes have entered into formal written agreements with the Oklahoma Department of Human Services (hereinafter OKDHS) to utilize tribal placement preferences.[7]

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[7] Oklahoma Tribal Placement Preferences (2011) (on file with Indian Child Welfare Program Manager, OKDHS CWS Specialized Services and Partnerships, P.O. Box 25352, Oklahoma City, OK 73125). The following tribes have enacted tribal placement preferences: Absentee Shawnee Tribe of Oklahoma, Alabama Quassarte Tribal Town, Apache Tribe of Oklahoma,

(Continued on following page)

E. ICWA also envisions and promotes tribal/state collaborations. 25 U.S.C. §1919(a). Where tribal/state relationships promote collaboration, OICWA tribal child welfare workers engage and cooperate with state social workers to design case plan and provide services for the Indian child and his or her family. Indian families may be more likely to seek services from tribal agencies as opposed to state agencies for a variety of reasons including distrust of the state agencies and bias. However, some Indian families may opt to receive services that are provided in collaboration between a tribal child welfare provider and a state child welfare provider.

OICWA's tribal/state collaborations are made, in part, pursuant to Oklahoma law and formal tribal/state foster care agreements, which address tribal/state collaborative efforts and may set forth tribal foster care and adoptive placement preferences. Currently, 35 of Oklahoma's 38 federally recognized

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Caddo Nation, Cherokee Nation, Cheyenne-Arapaho Tribes, Chickasaw Nation, Choctaw Nation, Citizen Potawatomi Nation, Comanche Nation, Delaware Nation, Eastern Shawnee Tribe, Fort Sill Apache Tribe, Iowa Tribe, Kaw Nation, Kialegee Tribal Town, Kickapoo Tribe of Oklahoma, Kiowa Tribe, Miami Tribe, Modoc Tribe of Oklahoma, Muscogee (Creek) Nation, Osage Nation, Otoe-Missouria Tribe of Indians, Ottawa Tribe of Oklahoma, Pawnee Nation of Oklahoma, Peoria Tribe of Oklahoma, Ponca Tribe of Oklahoma, Quapaw Tribe of Oklahoma, Sac & Fox Tribe, Seminole Nation of Oklahoma, Seneca-Cayuga Tribe of Oklahoma, Tonkawa Tribe of Oklahoma, United Keetoowah Band of Cherokee Indians in Oklahoma, Wichita & Affiliated Tribes and the Wyandotte Nation.

tribes have entered into formal tribal/state foster-care agreements with OKDHS wherein the responsibilities of the tribe and the state child welfare agency are carefully set out.[8]

Impediments to ICWA's application had an impact on this litigation, but once ICWA was applied, the case proceeded true to the statute and according to expressed congressional intent. This Court should affirm the South Carolina Supreme Court decision that allowed Baby Girl to return to her Father and extended family within the Cherokee Nation.

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[8] Oklahoma Tribal/State Foster Care Agreements (2011) (on file with Indian Child Welfare Program Manager, OKDHS CWS Specialized Services and Partnerships, P.O. Box 25352) Oklahoma City, OK 73125. The following tribes have enacted tribal foster care agreements: Absentee Shawnee Tribe of Oklahoma, Alabama/Quassarte Tribal Town, Apache Tribe of Oklahoma, Caddo Nation, Cherokee Nation, Cheyenne-Arapaho Tribes, Chickasaw Nation, Choctaw Nation, Citizen Potawatomi Nation, Comanche Nation, Delaware Nation, Eastern Shawnee Tribe, Fort Sill Apache Tribe, Iowa Tribe, Kaw Nation, Kialegee Tribal Town, Kickapoo Tribe of Oklahoma, Kiowa Tribe, Miami Tribe, Modoc Tribe of Oklahoma, Muscogee (Creek) Nation, Osage Nation, Otoe-Missouria Tribe of Indians, Ottawa Tribe of Oklahoma, Pawnee Nation of Oklahoma, Peoria Tribe of Oklahoma, Ponca Tribe of Oklahoma, Quapaw Tribe of Oklahoma, Sac & Fox Tribe, Seminole Nation of Oklahoma, Seneca-Cayuga Tribe of Oklahoma, Tonkawa Tribe of Oklahoma, United Keetoowah Band of Cherokee Indians in Oklahoma, Wichita & Affiliated Tribes and the Wyandotte Nation.

ARGUMENT

THE SOUTH CAROLINA SUPREME COURT PROPERLY APPLIED ICWA.

I. ICWA Is Configured To Protect The Best Interests Of Indian Children And To Promote The Stability And Security Of Indian Tribes.

> *"One might ask, since both Indian and non-Indian systems should act in the best interest of the child, what difference it makes which court has jurisdiction. The difference is that these decisions are inherently biased by the cultural setting of the decisionmaker. . . ."*

Manz, *Indian Child Welfare Act, A Legislative History of Public Law No. 95-608*, Volume 1, p. 44 (2012) (citing *Indian Family Defense*, Winter, 1974).

"ICWA is intended to protect not only the interests of individual Indian children and families but also the interests of the tribes themselves in long-term tribal survival." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989); *See also Matter of Adoption of D.M.J.*, 741 P.2d 1386, 1390 (Okla. 1958) (the purpose of the ICWA is to promote the stability and security of Indian tribes, children and families).

Perhaps Chief Isaac of the Mississippi Band of Choctaws said it best:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal

> heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribe's ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.

Holyfield, at 34 (citations omitted).

Congress' declaration of policy includes providing assistance to Indian tribes in the operation of child and family services. 25 U.S.C. §1902. This policy is the calling of the OICWA tribal child welfare worker. OICWA's membership consists of members from each and every federally recognized tribe in Oklahoma. These tribal child welfare workers assist member Indian children and their families who are involved in child custody proceedings in tribal courts and state courts across the nation.

Prior to the enactment of the ICWA, the Indian Child Welfare Statistical Survey indicated that 1 out of every 40.8 Indian children in Oklahoma had been adopted compared to 1 out of every 188.1 non-Indian children. One out of every 133 Indian children was placed in foster care as opposed to 1 out of every 551 non-Indian children. That calculates 4.4 times as many Indian children in adoptive homes as non-Indian children and 3.9 times as many Indian children in foster care as non-Indian children. Manz, *Indian Child Welfare Act, A Legislative History of*

Public Law No. 95-608, Volume 1, p. 47 (2012) (citing *The Indian Child Welfare Statistical Survey*, July 1976, prepared by the Association on American Indian Affairs, Inc.).

A. Congress Concluded That Implementation Of ICWA Itself Would Be In The Best Interest Of Indian Children.

H.R. Rep. No. 95-1386 (1978). A determination that a child is an Indian child is the first predicate of an ICWA analysis. The ICWA definition of an Indian child "means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. §1903(5).

Determining whether a child is a member of an Indian tribe is a key attribute of sovereignty and is directly tied to tribal survival. Indian tribes have the exclusive power to determine their own membership. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Indian tribes may determine tribal membership by written law, customs, intertribal agreements or by treaties. Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, §4.01[2][b], at 214 (Nell Jessup Newton ed., 2012) (citing footnote 76). Bureau of Indian Affairs Guidelines for State Courts sets forth that the determination by a tribe that a child is or is not a member of that tribe, is or is not eligible for membership in that tribe, or that the biological

parent is or is not a member of the tribe is conclusive. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,586(B)(1) (Nov. 26, 1979).

In an ICWA case, state social services or private adoption agencies make initial inquiries regarding Indian heritage. The inquiries as to the Indian heritage of a child in custody cases should not be taken lightly. Attorneys working with Indian children or their families are under a duty to investigate a child's possible Indian heritage and inform the court if the attorney suspects Indian heritage.

In fact, Oklahoma case law indicates that a failure to inquire as to a child's Indian status may give rise to malpractice and/or bar sanctions. *See Adoption of Baby Girl B.*, 67 P.3d 359, 374 (Okla. Civ. App. 2003) ("This Court holds that *every* attorney involved in matters concerning Indian children subject to the Indian Child Welfare Act is under an affirmative duty to insure full and complete compliance with thee Acts [state and federal ICWA]. This Court recognizes that an attorney who is *solely* an advocate for prospective adoptive parents may, in the course of advocacy, argue that good cause and the best interests of the child favor the adoptive parents. However, this Court further holds that this same attorney, while acting solely as an advocate for prospective adoptive parents, qualifies as "any person" under [the Oklahoma Indian Child Welfare Act (hereinafter "Okla. ICWA") Section 40.6, when the attorney becomes involved to the extent of being an

intermediary between a parent and prospective adoptive parents and then participating in legal proceedings leading to the placement of an Indian child.") *Id.* at 372 (citation omitted and emphasis added).

The second predicate in the ICWA analysis is whether the action falls into one of four types of cases listed as child custody proceedings. 25 U.S.C. §1903(1). Child custody proceedings are listed as: foster care placements, termination of parental rights, preadoptive placements and adoptive placements. Each of those terms is defined in ICWA. 25 U.S.C. §1903(1)(i-iv). In the instant case, the issues of whether *Baby Girl* is an Indian child and whether the proceeding was a child custody case as defined by the ICWA are not in dispute. Once these two predicates were established, ICWA mandated that notice be given to the parents or Indian custodian and the tribe. 25 U.S.C. §1912(a)

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe by registered mail with return receipt requested, of the pending proceeding and their right of intervention.

Id.

B. Early Notice To The Tribe Is Crucial.

Notice begins the chain of events wherein the tribal child welfare worker draws upon tribal customs and traditions, tribal child rearing practices and tribal resources in order to begin tailoring a plan of tribal services to offer the Indian child and the family. Delays in this stage can have profound results.

In *Baby Girl*, Mother testified "that she knew 'from the beginning' that Father was a registered member of the Cherokee Nation, and that she deemed this information 'important' throughout the adoption process." Pet. App. 5a. "It appears that there were some efforts to conceal [Father's] Indian status"; the adoption agency's pre-placement form indicates that "[i]t was determined that naming him would be detrimental to the adoption." Pet. App. 6a. Mother's attorney provided the Cherokee Nation with Father's name while inquiring whether the child would be an "Indian child" subject to ICWA, however the attorney misspelled the Father's first name and provided both the wrong day and the wrong year for Father's date of birth. *Id.* This misinformation presented an impediment to the timely application of the ICWA not caused by the Father or the Tribe.

Errors and omissions at this stage create unwarranted frustration and heartache for everyone involved in the case. It is imperative that the tribal enrollment office be given as much correct information as possible to prevent a delay in the application of ICWA. OICWA tribal child welfare workers cite

incomplete information common in this area to include: providing only the child's first initial and last name with no birthdate, misspelled names, and incorrect birthdates being sent to tribal enrollment offices regarding an Indian child inquiry. The notice provision is so crucial that ICWA has included a safety valve in its language to allow parties to seek relief if the notice provisions of the ICWA have been violated. 25 U.S.C. §1914.

Notice triggers the tribal child welfare worker to begin implementation of the tribe's child welfare policy regarding ICWA cases and the worker begins to formulate whether to intervene and/or request a transfer of the case to tribal court. Since the majority of Oklahoma tribes do not have attorneys for their Indian Child Welfare Departments, the tribal child welfare worker may appear in state court to inform the state court of the tribe's intentions. If the tribe intervenes, the tribal child welfare worker appears in state court and may make tribal recommendations regarding what the tribe feels is best for the child based upon tribal customs and traditions. The Oklahoma Supreme Court has held that a failure to allow a tribe to intervene is reversible error and that any party could raise that issue on appeal. *Matter of Guardianship of Q.G.M.*, 808 P.2d 684, 689 (Okla. 1991). (We cannot ignore the plain words of a statute. ICWA allows a tribe to intervene at any point in the proceeding.)

C. ICWA Envisioned A Higher Level Of Service Provision For Indian Families.

ICWA mandates that any party seeking to effect a foster care placement of, or termination to, an Indian child under State law must satisfy the court that active efforts have been made to provide remedial and rehabilitative programs designed to prevent the breakup of the Indian family and that the efforts have proven unsuccessful. 25 U.S.C. §1912(d). *Active* efforts require more than the *reasonable* efforts mentioned in the Adoption and Safe Families Act. 25 U.S.C. §671(a)(15)(D). In Oklahoma, failing to go beyond a minimal approach to service providing is reversible error. *Matter of J.S. and M.C.*, 117 P.3d 590, 593, 594 (Okla. Civ. App. 2008).

The day-to-day work of a tribal welfare worker includes incorporating tribal customs and traditions into tribal family service programs. Tribal child welfare workers understand that ICWA's remedial protections for the parents of an Indian child apply irrespective of whether that parent is Indian or non-Indian. Thus, a non-Indian parent of an Indian child is protected under the ICWA just the same as the Indian parent. An OICWA worker will offer services to the family irrespective of whether or not the parent is Indian. Active efforts to provide remedial and rehabilitative services designed to prevent the breakup of the Indian family are mandated by ICWA. However, in *Baby Girl*, the South Carolina Supreme Court found that ***no*** efforts were made to prevent the breakup of the Indian family and petitioners did not

contend otherwise. Pet. App. 26a (emphasis added). The lack of active efforts in this case presented a stark departure from the ICWA mandates.

D. ICWA Placement Preferences Advance The Best Interests Of Indian Children And Promote Tribal Sovereignty.

The intent of ICWA placement preferences is to provide a home for Indian children, which adequately reflects their cultural value and traditions. B. J. Jones, *et al.*, *The Indian Child Welfare Act Handbook, A Legal Guide to the Custody and Adoption of Native American Children* (ABA 2008). ICWA sets forth presumptive placement preferences for the state court to follow in adoptive placements involving Indian children: 1) a member of the Indian child's extended family, 2) other members of the Indian child's tribe, and 3) other Indian families. 25 U.S.C. §1915(a). ICWA includes a provision that allows tribes to enact their own placement preferences by tribal resolution so long as the placement preferences are the least restrictive setting appropriate to meet the particular needs of the child. 25 U.S.C. §1915(c) (1978). The ICWA placement preference scheme requires that the best interest of the child be analyzed against the backdrop of the mutual interests of the child and the tribe in maintaining tribal connections.

The OICWA tribal child welfare worker begins early on at the notice stage working in concert with

adoption agencies seeking to place Indian children and with the state child welfare worker to locate a range of possible placements that are in accordance with ICWA or the tribe's placement preferences. The extended family of the Indian child is the preferred placement and may include both Indians and non-Indians. The extended family is defined in the ICWA but also may be defined according to the law or custom of the tribe. 25 U.S.C. §1903(2). Some Oklahoma tribes have ample tribal foster care, preadoptive and adoptive placement options while other tribes do not. In the absence of an extended family member placement, a tribal child welfare worker may seek out Indian foster, preadoptive or adoptive placement from other tribes in an effort to place the Indian child with an Indian family. The tribal child welfare worker may advocate for these placement preferences in state court.

The placement preference scheme contains a "good cause" exception. 25 U.S.C. §1915(a) and (b). The good cause language must be utilized in a manner that is consistent with congressional finding that it is best for Indian children to be raised within their extended families or in tribal homes. The good cause provision provides a flexible option when facts are presented that can compellingly justify deviation from the presumptive placement preferences.

In *Baby Girl*, the petitioners knew from the four-month mark, that Father wanted custody. Pet. App. 27a. The litigation lingered until Baby Girl turned two. The South Carolina Court held that the bonding

that took place during the protracted litigation did not constitute good cause to deviate from the ICWA placement preferences. Pet. App. 38a-39a. This finding is true to the ICWA statute and consistent with congressional intent.

E. ICWA Envisioned Tribal/State Collaborations Toward Implementation.

Tribal/State collaboration is an important touchstone of the ICWA. Accordingly, Oklahoma has amended the Oklahoma Indian Child Welfare Act to reflect this Court's guidance in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), to promote and protect the sovereignty of Oklahoma tribes and to enhance tribal/state cooperation on ICWA cases. The Oklahoma ICWA's purpose is as follows:

> The purpose of the Oklahoma Indian Child Welfare Act is the clarification of state policies and procedures regarding the implementation by the State of Oklahoma of the federal Indian Child Welfare Act, P.L. 95608. It shall be the policy of the state to recognize that Indian tribes and nations have a valid governmental interest in Indian children regardless of whether or not said children are in the physical or legal custody of an Indian parent or Indian custodian at the time state proceedings are initiated. It shall be the policy of the state to cooperate fully with Indian tribes in Oklahoma in order to ensure that the intent and provisions of

> the federal Indian Child Welfare Act are enforced.

Okla. Stat. Ann. tit. 10 §40.1 (West 1994).

Moreover, the Oklahoma Supreme Court held *In the Matter of Baby Boy L.*, 103 P.3d 1099 (Okla. 2004) that the Oklahoma Indian Child Welfare Act and the ICWA applied to a case wherein a non-Indian adoptive mother sought an adoption without the consent of the Indian father. The non-Indian mother argued that neither Act was applicable because the proceeding did not involve the dissolution of an Indian family or the removal of custody from an Indian parent. The court held that "because of the recent statutory amendments, which in essence codified the holding in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), we determine the 'existing Indian family exception' is no longer pertinent to Indian child custody proceedings in Oklahoma. . . ." *Baby Boy L.* at 1101. Thus, *Baby Boy L.* expressly overruled prior inconsistent Oklahoma case law regarding the existing Indian family exception. *Id.*

The creation and survival of the existing Indian family exception to the ICWA is proof that ICWA is still needed. "By applying the existing Indian family exception, the states are using a back-door approach to do exactly what the ICWA was intended to prevent: imposition of white middle class standards to child custody cases involving American Indian children." Cheyanna L. Jaffke, *JUDICIAL INDIFFERENCE: WHY DOES THE "EXISTING INDIAN FAMILY"*

EXCEPTION TO THE INDIAN CHILD WELFARE ACT CONTINUE TO ENDURE?, 38 WSULR 127, 134 (2011) (citing Amanda B. Westphal, Comment, *An Argument in Favor of Abrogating the Use of the Best Interests of the Child Standard to Circumvent the Jurisdictional Provisions of the Indian Child Welfare Act in South Dakota*, 49 S.D. L. Rev. 107, 124 (2003)).

OICWA tribal child welfare workers collaborate with the Oklahoma Department of Human Services ("OKDHS") caseworkers pursuant to a variety of Oklahoma statutes. The Oklahoma Administrative Code sets out the parameters of tribal/state foster care agreements with respect to Oklahoma Indian children. Okla. Admin. Code §340:75-19-32 (2006) (Tribal/State Agreements For Foster Care). These agreements allow tribes and OKDHS to come together collaboratively to better serve the needs of Oklahoma Indian children. The statute sets out that OKDHS will pay the cost of foster care for Indian children who are placed in tribally approved foster homes or who are in the custody of OKDHS. Okla. Admin. Code §340:75-19-32(b) (2006). Tribes may develop and implement tribal foster home standards according to each tribe's culture and traditions and OKDHS agrees to follow the tribal standards set forth in the agreement. Okla. Admin. Code §340:75-19-32(c) (2006).

OICWA tribal child welfare workers work collaboratively with Oklahoma agencies through Oklahoma's Interstate Compact on the Placement of Children (ICPC). Okla. Stat. Ann. tit. 10 §577 (West 2008). The ICPC was created to provide a process

through which children who are subject to the Act can be placed in safe and suitable homes in a timely manner. *Id.* at 577(1). The ICPC requires a promulgation of guidelines, in collaboration with Indian tribes for interstate cases involving Indian children. *Id.* at 577(8).

Article XVIII of the ICPC sets forth:

> Notwithstanding any other provision in this compact, the Interstate Commission may promulgate guidelines to permit Indian tribes to utilize the compact to achieve any or all of the purposes of the compact as specified in Article I. The Interstate Commission shall make reasonable efforts to consult with Indian tribes in promulgating guidelines to reflect the diverse circumstances of the various Indian tribes.

Id.

OICWA tribal child welfare workers engage in the ICPC process to advocate for adherence to the ICWA and the Oklahoma ICWA. The Oklahoma ICWA and the ICPC were questioned in the case of *Cherokee Nation v. Nomura, et al.*, 160 P.3d 967 (Okla. 2007). In *Nomura*, an Indian child born in Oklahoma to an Indian mother was voluntarily placed for adoption with a non-Indian Florida couple through a Florida adoption agency. The Florida court terminated the parental rights of the birth mother and to any known and unknown biological father. The Florida court held that although the case was an ICWA case, a voluntary proceeding did not require notice to the Tribe. *Id.* at

969, 970. The Florida court held that all provisions of the ICWA had been complied with. The Florida court found that mother's preference constituted good cause to waive the placement preferences. Michael Nomura, the Oklahoma Administrator of the ICPC, withdrew his previous approval indicating all ICPC requirements had been met in Oklahoma. *Id.* at 972.

The Cherokee Nation received notice after the Florida judgment was entered. *Id.* at 970. The Cherokee Nation sought a temporary restraining order to prevent Mr. Nomura from issuing a Form 100A that would permit the Florida adoption of an Oklahoma-born Indian child to go forward. Mr. Nomura sought a declaratory judgment regarding the applicability of the ICWA and the Oklahoma ICWA to the Florida adoption proceedings. *Id.* at 969.

The Florida adoption agency argued that the mother, as opposed to Mr. Nomura, was the "sending agency" under the ICPC and that Mr. Nomura had no authority to refuse to sign the Form 100A and send it to Florida. The Florida agency also contended the Oklahoma ICWA was unconstitutional as it infringed upon the mother's constitutional and fundamental rights in and to her child and that the Oklahoma ICWA was a race-based statute. The Florida agency urged the strict scrutiny test be applied when examining the Oklahoma statute. *Id.* at 972.

Mr. Nomura contended that the ICPC required a parent wishing to relinquish parental rights to demonstrate the parent had utilized the tribe's resources

to the maximum extent possible. Mr. Nomura contended that his signature on Form 100A indicates to a receiving state that the evaluation process is complete. Mr. Nomura also stated that the Florida agency had attempted to ignore the clear intent of the federal ICWA and the Oklahoma ICWA. *Id.* at 973, 974.

The court held that the Oklahoma ICWA was constitutional and did apply to this voluntary proceeding. The court adhered to the teachings of *Holyfield*, namely that the placement preferences are the most important substantive requirement imposed on state courts. The trial court held that the ICWA and the Oklahoma ICWA must be followed. *Id.* at 977. The court also held that Mr. Nomura in his official capacity has a duty to see that there is compliance with the placement preferences of both the ICWA and the Oklahoma ICWA prior to approving the adoption under the Interstate Compact. *Id.* at 974, 975. The court went on to hold that adoptions of Oklahoma Indian children require notice to the Tribe and compliance with the Oklahoma ICWA and ICWA whether the proceedings were voluntary or involuntary. *Id.* at 974.

In *Baby Girl*, the ICPC Form 100A signed by Mother, "reported Baby Girls' ethnicity as 'Hispanic' instead of 'Native American.'" Pet. App. 7a. Had the Father's status as a member of the Cherokee Nation been known, neither the Cherokee Nation nor the Oklahoma ICPC agency would have consented to the removal of the Indian child from Oklahoma. *Id.* at 107a. *See id.* at 7a-8a & n.8; *see also* Nomura policy

letter on how the ICPC applies to ICWA-eligible children at Appendix 1a and Form 100A at Appendix 2a. This misinformation presented another impediment to the timely application of the ICWA.

While ICWA has brought about many changes in the way state courts proceed in ICWA cases, there is still much work to be done. More education on the ICWA is needed for state court judges, attorneys and state social workers. This case presented nothing new to the OICWA workers; they have not been strangers to attempts to thwart the application of ICWA and the protections it provides Indian children, families and tribes. Ultimately, the OICWA tribal child welfare workers will continue doing the work they always do with grace and resolve: promoting the best interests of Indian children and tribal sovereignty utilizing the ICWA.

CONCLUSION

The South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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RESOURCE CENTER DIRECTOR
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APPENDIX

Oklahoma Interstate Compact
on the Placement of Children
Under Contract with OKDHS – ICPC

Heritage Family Services, Inc.

5110 S. Yale Avenue, Suite 525 ◆ Tulsa, OK 74135 ◆
Tel 918 491-6767 ◆ Fax 918 491-6717

❖

Building Families & Changing Lives

Letter Submitted Via Email
to angela.connor@chickasaw.net

March 25, 2013

Angela Connor
OICWA President
P. O. Box 1274
Shawnee, OK 74802-1274

Dear Angela,

I am responding to your request for information about how our office's procedures for handling cases for the Interstate Compact on the Placement of Children (ICPC) when the child appears to be subject to the Indian Child Welfare Act (ICWA). The ICPC compact includes all fifty states, the District of Columbia, and the U.S. Virgin Islands. Compacts are allowed under the U.S. Constitution and create binding agreements between the states. The ICPC is statutory law in all member states. At this time, federally recognized Indian tribes are not part of the ICPC compact, but we have worked cooperatively with a number of Oklahoma tribes to effectuate interstate placements.

I will begin by providing some general information on the handling of ICPC cases and then will provide more specific information on the handling of ICWA cases through the ICPC. As you know, Heritage Family Services is under contract with the Oklahoma Department of Human Services to administer the ICPC process for all adoption cases into or out of Oklahoma through the ICPC process. Heritage has been performing this function for nearly fifteen years now, since June of 1998. During the time we have administered the ICPC contract, we have process [sic] approximately 5,600 interstate adoption cases. These include public custody adoptions, placements through private adoption agencies, and independent adoption cases.

When an agency or an attorney initiates an ICPC request for an adoptive placement, they must begin by submitting a packet of information to the ICPC office for the "sending state" from which the child's placement is originating. The "sending agency or party" must fill out and sign an **ICPC form 100A**, which is the form used nationwide to request an ICPC placement. This form must be signed by one who has legal authority to place the child for adoption. This "sending party" could be the birth parent, the court, an adoption agency, or in some cases by an Oklahoma attorney to whom the child has been relinquished. The packet must also contain copies of legal documents such as a consent for adoption, a relinquishment of parental rights, or an order terminating parental rights. The packet must include information about the child, such as medical records, social history and other documents

on the child. The packet must include a current adoption home study on the prospective adoptive family, including all required criminal and child abuse background checks. Most states, including Oklahoma, require a form filed [sic] out by the birth mother or by both birth parents which provides medical and social history on the birth parents. These are some of the general items that are required to be included in every packet submitted with an ICPC form 100A. These forms are carefully reviewed by our office. The review focuses on the completeness of the documentation as well as on the compliance with state and federal laws regarding adoption.

One of the first topics for assessment is whether ICPC applies or not. There are some types of placements, especially those placements between close relatives, that are not subject to the ICPC. Second, we look at whether the sending party has the legal authority to send the child for an adoptive placement. Third, we look at whether the child is legally eligible to be adopted or what stage or stages of the legal process have been completed. If both parents have not given their voluntary consent to the adoption or had their parental rights terminated by the court, then the prospective adoptive parents must sign a form acknowledging that this is a "legal risk" placement and they might have to return the child if the adoption cannot be completed legally. This legal analysis includes an evaluation of whether the adoption is or is not subject to ICWA, and this process will be discussed in more detail in a subsequent paragraph.

Fifth, we evaluate if the prospective adoptive parents have met the requirements in their state of residence to adopt. This requires a thorough review of the adoptive home study and all the documentation that goes along with this assessment of the family. Sixth, our office evaluates whether or not the prospective adoptive family appears to be an "appropriate" placement for the child. This includes looking at any special needs the child may have and whether the adoptive family has the strengths and resources to meet those needs. Based on all of these steps, the ICPC office then has the responsibility of either approving or denying the placement on the ICPC form 100A. Then the ICPC decision must be communicated to the sending party and to the other ICPC office.

There are several ways that our ICPC office might learn that a child has Native American heritage. First, there is a box on the 100A form which asks if the child is "ICWA Eligible." Second, there is an area of the 100A form for ethnicity information with one of the options being Native American. Third, the legal documents should contain a finding by the court whether or not ICWA applies to the adoption. These documents may include the birth mother's consent, the birth father's extrajudicial consent, or a court order terminating parental rights. Fourth, in a minority of cases a letter from the child's tribe has been secured to verify ICWA applicability. Fifth, the medical and social history form completed by the birth parents may indicate ethnicity and tribal membership. Sixth, some medical records may provide clues,

especially if the child was born at an Indian health facility. Seventh, some attorneys or adoption agencies will provide explicit information about ICWA applicability, such as affidavits by the birth parents about any tribal membership.

Oklahoma's ICPC office is more aware of ICWA than other states ICPC offices, since Oklahoma has thirty-nine federally recognized Indian tribes within the second largest population of Native Americans of all the states. Therefore, our ICPC office pays close attention to the Indian status of every child whose case we handle. Our standard practice is to monitor each case in which ICWA applies to insure that the child's Indian tribe has been given legal notice of the adoption, thus insuring the tribe has the option under ICWA to intervene in the legal case.

Oklahoma ICPC must monitor for compliance not only with the federal ICWA, but our state legislature has adopted in state statutes an Oklahoma Indian Child Welfare Act (OICWA) to support and supplement the federal act. 25 USC §1921 states, "In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard." Therefore, the Oklahoma ICPC office includes in our monitoring of ICWA cases, whether there has been compliance with certain sections of

OICWA, which appear to create a higher standard that [sic] found in federal ICWA.

One of these higher standards may be found in 10 O.S. 2011 § 40.6 of OICWA. This section states in part:

> The placement preferences specified in 25 U.S.C. §§ 1915, shall apply to all preadjudicatory placements, as well as preadoptive, adoptive and foster care placements. In all placements of an Indian child by the Oklahoma Department of Human Services (DHS), or by any person or other placement agency, DHS, the person or placement agency shall ***utilize to the maximum extent possible the services of the Indian tribe of the child*** in securing placement consistent with the provisions of the Oklahoma Indian Child Welfare Act. (Emphasis added).

In 2007, the Oklahoma Supreme Court upheld this section of OICWA in ***Cherokee Nation v. Nomura***, 2007 OK 40, 160 P.3d 967. Specifically, the Oklahoma Supreme Court affirmed the declaratory judgment that our ICPC office had requested from the trial court. In doing so, the OK Supreme Court declared:

> We hold that adoptions of Oklahoma Indian children require notice to the Tribe and compliance with the Oklahoma Act, whether the child custody proceedings are voluntary or involuntary. ***The Administrator has a duty to question whether compliance has been made before signing the Form 100A*** which

> facilitates sending the adoption to another state to complete. (Emphasis added).

As a result of this significant ruling, our office has sought to live up to this duty by carefully scrutinizing every ICPC case for compliance with both federal ICWA and OICWA.

In any case where the adoption of the child appears to be subject to ICWA, our office asks the adoption agency or attorney who is sending the child for adoption and who submitted the ICPC case to provide documentation of complying specifically with § 40.6 of OICWA. We ask that this documentation show communication with the tribe and efforts made to use the tribe's services to find a placement within the preferences of federal ICWA. In ***Cherokee Nation v. Nomura***, the Court declined to define "maximum efforts" but noted that there had been no notice given at all to the tribe. Likewise, our office does not attempt to define "maximum efforts" but instead looks for a good faith attempt to reasonably use the services of the child's tribe.

Some Oklahoma tribes will provide information on available tribal adoptive families to adoption agencies or attorneys. Other tribes chose to not provide such information and some of the smaller tribes do not have adoption programs. For instance, the Cherokee Nation routinely provides profiles of tribal adoptive families who are willing to work with private adoption agencies or attorneys. In those case, our ICPC office asks the sending agency or attorney to present

these profiles of adoptive families to the birth mother. We would ask them to have the birth mother give a good faith consideration to the tribal families. Whether the placement then is made with a tribal family or with an adoptive family who is outside the preferences may be up to a court to decide, since any departure from the ICWA placement preferences requires a court to determine that good cause exists to depart from the federal preferences. By that time, the tribe has received notice of the proceedings and has the opportunity to exercise its ICWA rights to intervene, seek transfer to tribal court, and argue over the issue of good cause.

The OK-ICPC office does not attempt to determine good cause, as that is for a court to do. Our determination of whether to let the ICPC case go forward focuses on whether a valid attempt has been made to utilize the services of the child's tribe to find a placement within the preferences in compliance with §40.6 of OICWA. Once that attempt has been made and documented, the ultimate outcome of an adoptive placement will be up to a court and not to our office. At that point, if the other ICPC requirements have been made, then our ICPC office will sign the form 100A and allow case to be sent on for processing by the receiving state's ICPC office. If the receiving state approves the placement, then the child may be placed with that prospective adoptive family in that state. Until both the sending and receiving state ICPC offices have processed the case and the receiving state

has given its approval, it is illegal for the child to leave the sending state.

Once the placement is made, our office will monitor the adoption until it finalizes or some other outcome occurs. Our office will request and review supervisory reports about how the child and family are adjusting. In some instances, where there is an appeal or some other reason for a delay in finalization of an adoption, then our office will continue to monitor the case until the issues are resolved by the court.

Sincerely,

/s/ Michael A. Nomura
Michael A. Nomura
OK-ICPC for Adoptions
Under Contract with
OKDHS-ICPC
General Counsel
Heritage Family Services, Inc.

ICPC 100A
REV. 8/2001

INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN REQUEST

One form per child
Please Type

TO:

FROM:

SECTION I - IDENTIFYING DATA

Notice is given of intent to place –
Name of Child:

Social Security Number:

ICWA Eligible
☐ Yes ☐ No

Sex:

Date of Birth

Title IV-E determination
☐ Yes ☐ No ☐ Pending

Ethnicity: **Hispanic Origin:** ☐ Yes ☐ No
☐ Unable to determine/unknown

Race:
☐ American Indian or Alaska Native
☐ Asian
☐ Native Hawaiian/ Other Pacific Islander
☐ Black or African American
☐ White

Name of Mother:

Name of Father:

Name of Agency or Person Responsible for Planning for Child:

Phone:

Address:

Name of Agency or Person Financially Responsible for Child:

Phone:

Address:

SECTION II - PLACEMENT INFORMATION

Name of Person(s) or Facility Child is to be placed with:

Soc Sec # (optional):
Soc Sec # (optional):

Address:

Phone:

Type of Care Requested:
☐ Foster Family Home
☐ Group Home Care
☐ Child Caring Institution

☐ Parent
☐ Relative (Not Parent)
Relationship: _____
_____

☐ ADOPTION
☐ IV-E Subsidy
☐ Non IV-E Subsidy
To Be Finalized In:

☐ Child Caring Institution
☐ Residential Treatment Center
☐ Institutional Care-Article VI, Adjudicated Delinquent
☐ Other: _____

To Be Finalized In:
☐ Sending State
☐ Receiving State

Current Legal Status of Child:
☐ Sending Agency Custody/Guardianship
☐ Parent Relative Custody/Guardianship
☐ Court Jurisdiction Only
☐ Protective Supervision
☐ Parental Rights Terminated-Right to Place for Adoption
☐ Unaccompanied Refugee Minor
☐ Other:

SECTION III – SERVICES REQUESTED

Initial Report Requested (if applicable):
☐ Parent Home Study
☐ Relative Home Study
☐ Adoptive Home Study
☐ Foster Home Study

Supervisory Services Requested:
☐ Request Receiving State to Arrange Supervision
☐ Another Agency Agreed to Supervise
☐ Sending Agency to Supervise

Supervisory Reports Requested:
☐ Quarterly
☐ Semi-Annually
☐ Upon Request
☐ Other:

Name and Address of Supervising Agency in Receiving State:

Enclosed:
☐ Child's Social History
☐ Home Study of Placement Resource
☐ Court Order
☐ ICWA Enclosure
☐ Financial/Medical Plan
☐ IV-E Eligibility Documentation
☐ Other Enclosures

Signature of Sending Agency or Person: | Date:

Signature of Sending State Compact Administrator, Deputy or Alternate: | Date:

SECTION IV – ACTION BY RECEIVING STATE PURSUANT TO ARTICLE III(d) OF ICPC

☐ Placement may be made
☐ Placement shall not be made

REMARKS:

Signature of Receiving State Compact Administrator, Deputy or Alternate: | Date:

DISTRIBUTION (Complete six (6) copies):

- Sending Agency retains (1) copy and forwards completed original plus four (4) copies to:
- Sending Compact Administrator, DCA or alternate retains a (1) copy and forwards completed original and three (3) copies to:
- Receiving Agency Compact Administrator, DCA, or alternate who indicates action (Section IV) and forwards a (1) copy to receiving agency and the completed original and one (1) copy to sending Compact Administrator, DCA, or alternate within 30 days.
- Sending Compact Administrator, DCA, or alternate retains a completed copy and forwards the completed original to the sending agency.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

No. 12-399

Supreme Court, U.S.
FILED
MAR 2 2 2013
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF PROFESSORS OF INDIAN LAW AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, may be invoked by noncustodial parents.

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INTEREST OF AMICI CURIAE

Amici curiae, listed in the Appendix, are law professors who specialize in Indian law. They file this brief in order to acquaint the Court with the long history of the practices the Indian Child Welfare Act ("ICWA") was intended to stop. This history sheds considerable light on the meaning of the Act, but it is absent from the briefs filed by petitioners and their amici.[1]

SUMMARY OF ARGUMENT

The Indian Child Welfare Act cannot be understood without an appreciation of the practices it was intended to stop.

One of these practices was the removal of Indian children from their families. One of the primary reasons Indians were thought to be unfit to raise children was that in many tribes, the rearing of children was not a task solely for the nuclear family. Domestic responsibilities like child care were undertaken jointly by multiple tribe members. Indian children thus often spent much of their time outside

[1] The parties have filed blanket consents to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Amici file this brief as individuals and not on behalf of the institutions with which they are affiliated.

the custody of their parents. Government officials perceived Indian family structure as a grave defect and repeatedly urged that Indians should be made to live in nuclear families instead.

At first, the policy of removing Indian children from their families was implemented by compelling children to attend boarding schools. At these schools students were forced, often through physical abuse, to adopt mainstream American ways. By the mid-twentieth century, the boarding schools were widely recognized as a failure.

When boarding schools fell out of favor, the federal government turned to adoption as an alternative means of assimilation. By the early 1970s, an astonishing number of Indian children were being placed for adoption in non-Indian families. One reason was a very old one: social workers were generally unfamiliar with the common Indian practice of using the extended family to raise children. When social workers saw children under the care of adults who were not their parents, the social workers often misinterpreted this custom as neglect.

Another practice ICWA was intended to stop was the destruction of Indian tribes and Indian culture. For most of American history, policymakers believed that the Indians' traditional culture and political structure were hindrances to their "civilization." The federal government took many steps to stamp out Indian culture, from prohibiting traditional religious ceremonies to requiring Indians to adopt English

names. Government policy in this regard would change dramatically in the 1960s and 1970s. Rather than seeking to eradicate Indian tribes and Indian culture, the government began trying to help Indians preserve them. The Indian Child Welfare Act was an important part of this turnabout.

In the hearings that led up to ICWA, Congress heard considerable evidence that social workers were seizing children because they misinterpreted Indian childrearing practices as neglect. In addition, many witnesses testified to their fear that the loss of so many children posed a threat to the very existence of Indian tribes and Indian culture. All this testimony made a profound impression on the principal sponsors of ICWA, who made clear that the statute was intended to put a stop to these practices.

Because one of the abuses ICWA was intended to stop was the removal of Indian children on the ground that their parents were noncustodial, it would have made no sense for Congress to limit the statute's protections to custodial parents. This is why the term "parent" is defined in ICWA without any requirement of custody.

Because one of the abuses ICWA was intended to stop was the frequency with which state government employees and social workers imposed their own ideas of the family on the Indians, it would have made no sense for Congress to empower state government employees and social workers to determine whether children are being raised by an "existing

Indian family." This is why the statute includes no such requirement.

Because one of the abuses ICWA was intended to stop was the destruction of tribal culture, the statute grants rights to tribes as well as to parents. It would have made no sense for Congress to extend protection to tribes and custodial parents while simultaneously withholding protection from noncustodial parents, because the threat to the existence of Indian tribes from the loss of their children was equally serious whether any particular child was being raised by his parents or by another member of the extended family.

There is also a broader lesson in the record of government-backed efforts to remove Indian children from their homes. We all sympathize with young children, and we all want what is best for them. Where Indian children are concerned, however, these sympathies have a long and often unattractive history. They are the sympathies that gave rise to the very policies ICWA was intended to stop.

ARGUMENT

The historical background to ICWA makes clear that the statute may be invoked by noncustodial parents.

The Indian Child Welfare Act cannot be understood without an appreciation of the practices it was intended to stop. For most of American history, federal Indian policy favored the removal of Indian

children from their homes and the eradication of Indian tribes and Indian culture. These measures were undertaken to facilitate the Indians' assimilation.

Federal Indian policy changed dramatically in the 1960s and 1970s, when the government began trying to help Indians preserve their culture and their family structures. The Indian Child Welfare Act was an important part of this reversal. ICWA was intended to put a stop to several longstanding practices that had come to be understood as mistakes.

One of these practices was the removal of Indian children from their homes and families. Government officials and private social workers often misconstrued Indian family patterns; they used circumstances that were perfectly normal in many Indian families as reasons for taking children from their homes. One of these circumstances was that aunts, grandparents, and other relatives often played key roles in raising Indian children. For a century before ICWA, government officials and social workers interpreted this practice as neglect and cited it as a reason for taking Indian children away, at first to be sent to boarding schools and later to be put up for adoption.

Before Congress enacted ICWA, it heard considerable evidence of the harms caused by such adoptions, in some cases where the child's biological parents had been custodial and in others where they had been noncustodial. Some of these harms were of course specific to the children and parents involved, but some were broader. The loss of so many children

imperiled the very existence of Indian tribes and Indian culture.

For these reasons, Congress drafted ICWA to protect Indian children without reference to whether their parents are custodial.

A. U.S. policy formerly favored removing Indian children from their families as a means of "civilizing" the Indians.

The once-conventional view was that the Indians would be better off assimilating into mainstream American life, and that the best way to accomplish this goal would be to take Indian children away from their parents so they could be raised in a non-Indian environment. *Cohen's Handbook of Federal Indian Law* 1397 (Nell Jessup Newton ed. 2012). For example, Cyrus Kingsbury, a missionary to the Cherokees and Choctaws, argued in 1816 that Indian "children should be removed as much as possible from the society of natives," to live instead with their teachers. Bernard W. Sheehan, *Seeds of Extinction: Jeffersonian Philanthropy and the American Indian* 133 (1973). "Removed from the bad example of Wild Indians in their drunken revelry," urged another writer a few years later, "the native talent can be [c]ultivated, surrounded by the first families in the West." *Id.* at 135.

The government officials responsible for relations with the Indians likewise believed that civilizing the Indians required separating children from the

baleful influence of their families. "All experience has demonstrated the impossibility of educating Indian children while they are permitted to consort and associate with their ignorant, barbarous, and superstitious parents," declared the appendix to a congressional report of 1867. "Where the Indian youth is left to the alternate struggle between civilization and barbarism the contest is likely to culminate on the side of his savage instincts." *Condition of the Indian Tribes: Report of the Joint Special Committee, Appointed Under the Joint Resolution of March 3, 1865*, at A3 (1867).

By the second half of the nineteenth century, officials were virtually unanimous in recommending that Indian children be raised apart from their parents. General Robert H. Milroy, the Superintendent of Indian Affairs in the Washington Territory in the 1870s, insisted that "[a]ll Indian children over five years old should be taken away from under the authority and influence of their savage parents (from whom they absorb only poisonous barbarism) and placed wholly under the control of white male and female teachers." R.H. Milroy, *Our Indian Policy Further Considered*, 5 Presbyterian Q. and Princeton Rev. 624, 625-26 (1876). If Indian children "had words in which to express their thoughts," averred Commissioner of Indian Affairs Thomas J. Morgan, they would beg to be saved "from the doom that awaits them if left to grow up with their present surroundings." The humanitarian thing to do, Morgan concluded, was "for the strong arm of the nation to reach

out, take them in their infancy and place them in its fostering schools, surrounding them with an atmosphere of civilization, . . . instead of allowing them to grow up as barbarians and savages." T.J. Morgan, *A Plea for the Papoose*, 18 Baptist Home Mission Monthly 402, 404 (1896).

1. One of the primary shortcomings policymakers found in Indian childrearing was that Indians tended to rely on extended kinship networks.

Policymakers had many reasons for believing that Indians were unfit to raise children, but one reason was that in many tribes the rearing of children was (and sometimes still is) a task for the extended family rather than just the nuclear family. *See, e.g.*, Institute for Government Research, *The Problem of Indian Administration* 572 (1928). Domestic responsibilities including child-rearing were undertaken jointly, by multiple tribe members. Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 Ark. L. Rev. 327, 328 (1986). Indian children thus often spent much of their time outside the custody of their parents, living with and receiving instruction from adults other than their mothers and fathers. *See, e.g.*, M. Inez Hilger, *Arapaho Child Life and Its Cultural Background* 75, 215-16 (Smithsonian Inst. Bureau of Am. Ethnology, 1952); Robert Staples and Alfredo Mirandé, *Racial and Cultural Variations Among American Families: A Decennial Review of the Literature on Minority*

Families, 42 J. of Marriage and the Family 887, 898 (1980).

Policymakers perceived Indian family structure as a grave defect. Lacey, *supra*, at 349-72. "The family is God's unit of society," declared Merrill Gates, the chairman of the Board of Indian Commissioners. "And here I find the key to the Indian problem." *Americanizing the American Indians: Writings by "Friends of the Indian" 1880-1900*, at 50 (Francis Paul Prucha ed. 1973). Government officials repeatedly urged that Indians should be made to live in nuclear families rather than tribes. "The tribal relations should be broken up," Thomas Morgan insisted, "and the family and the autonomy of the individual substituted." *Id.* at 75.

2. The policy of removing Indian children from their families was implemented at first by forcing children to attend boarding schools.

The earliest efforts to remove Indian children from their families were undertaken by missionaries and religious organizations. For example, the minister Eleazer Wheelock, who later founded Dartmouth College, began his career as an educator by running a boarding school for Indians in Connecticut in the 1750s and 1760s. James Axtell, *The European and the Indian: Essays in the Ethnohistory of Colonial North America* 89-109 (1981). Wheelock required that "the Children [be] taken quite away from their

Parents, and the pernicious Influence of *Indian* Examples." Eleazer Wheelock, *A Plain and Faithful Narrative of the Original Design, Rise, Progress and Present State of the Indian Charity-School* 25 (1763).

The federal government began operating Indian boarding schools in the 1870s. By 1905, more than 20,000 Indian pupils were enrolled in government-run boarding schools, many of which were located far from the children's homes. David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928*, at 320 (1995). The philosophy underlying these schools was best expressed by Richard Henry Pratt, the superintendent of the boarding school in Carlisle, Pennsylvania. "It is a great mistake to think that the Indian is born an inevitable savage. He is born a blank," Pratt reasoned. "Transfer the savage-born infant to the surroundings of civilization, and he will grow to possess a civilized language and habit." Pratt's goal for each of his Indian students, he explained, was to "[k]ill the Indian in him and save the man." *Id.* at 52.

The curriculum at the Indian boarding schools reflected this philosophy. Students were required to speak English and were punished – often beaten – for using their native languages. *Boarding School Blues: Revisiting American Indian Education Experiences* 25 (Clifford E. Trafzer et al. eds. 2006); *Cohen's Handbook*, *supra*, at 77. They were taught American history from a distinctly non-Indian point of view. They learned to play western musical instruments and to sing patriotic and Christian songs. *Boarding School*

Blues, *supra*, at 26-27. At some of the schools, children were victims of physical and sexual abuse. *Id.* at 220-21; Adams, *supra*, at 122-23. *See also* 146 Cong. Rec. E1454 (Sept. 12, 2000) (reprinting the apology of the Assistant Secretary of the Interior for such abuse).

Indian children were often forced to attend boarding school over the objections of their parents. Jon Reyhner and Jeanne Eder, *American Indian Education: A History* 169-79 (2004). Officials withheld food rations from Indians unwilling to part with their children. The police undertook annual fall roundups, seizing children from their homes and taking them away to school. Adams, *supra*, at 211. For example, one official on the Navajo Reservation recalled what he considered "the greatest shame of the Indian Service – the rounding up of Indian children to be sent away to government boarding schools":

> In the fall the government stockmen, farmers, and other employees go out in the back country with trucks and bring in the children to school. Many apparently come willingly and gladly; but the wild Navajos, far back in the mountains, hide their children at the sound of a truck. So stockmen, Indian police, and other mounted men are sent ahead to round them up. The children are caught, often roped like cattle, and taken away from their parents, many times never to return. They are transferred from school to school, given white people's names, forbidden to speak their own tongue, and when sent to

> distant schools are not taken home for three years.

The Destruction of American Indian Families 18 (Steven Unger ed. 1977).

Policymakers believed compulsory attendance at the boarding schools was for the Indians' own good. "[T]here should be no mawkish sentimentality as to the sacredness of the home ties," insisted one writer. "Something must be sacrificed, and whether it shall be the well-being of the little child and the good of the whole country, or the ignorant prejudices of the aboriginal mind, is the question to be considered." Mary Alice Harriman, *The Indian in Transition*, 35 Overland Monthly 33, 38 (1900). Carl Schurz, Secretary of the Interior during the Hayes administration, was but one of many officials who believed that forcing Indian children to assimilate was the Indians' only hope of survival. "To civilize them," Schurz observed, "has now become an absolute necessity, if we mean to save them." *Americanizing the American Indians*, *supra*, at 14.

Some of the boarding schools adopted what was called the "outing system," a form of temporary adoption under which Indian pupils were sent to live with non-Indian families for the summer or for the entire year. Adams, *supra*, at 156-63. Richard Henry Pratt, the originator of the plan, argued that it was the fastest way to assimilate the Indians, "for the reason that all their talking is with English-speaking people; and, being along the lines of civilized life and

its needs innumerable, other important things are learned at the same time." *Americanizing the American Indians*, *supra*, at 274. The Bureau of Indian Affairs encouraged other schools to follow Pratt's lead. *Documents of United States Indian Policy* 178 (Francis Paul Prucha ed., 3d ed. 2000).

The tide of opinion turned against the boarding schools in the mid-twentieth century. As early as 1928, the Meriam Report (a comprehensive review of federal Indian policy) concluded that the schools had disrupted Indian family life while contributing little to the Indians' wellbeing. Institute for Government Research, *supra*, at 574-75. The prevailing view is now even darker. As the catalog to a recent exhibit about the schools at Phoenix's Heard Museum relates, "Indian boarding schools were key components of cultural genocide against Native cultures." *Away from Home: American Indian Boarding School Experiences* 19 (Margaret L. Archuleta et al. eds. 2000). The federal government still operates Indian boarding schools today, but they serve a purpose precisely the opposite of their original goal. Their mission is no longer to eradicate Indian ways, but rather "to provide quality educational opportunities that are compatible with tribes' cultural and economic wellbeing and their wide diversity as distinct cultural and government entities." U.S. Government Accountability Office, *Bureau of Indian Education Schools*, GAO-08-679 (2008), at 8.

3. When the boarding schools fell out of favor as a means of assimilation, the government turned to adoptions by non-Indian families.

As policymakers lost faith in boarding schools, they turned to adoption as an alternative. Indian children had long been sent to live temporarily with non-Indian families under the "outing system," but before the mid-twentieth century Indian children were not permanently adopted by non-Indian families in significant numbers. That began to change in 1957, when the Bureau of Indian Affairs joined with the Child Welfare League of America to encourage social workers on Indian reservations to find children available for adoption. David Fanshel, *Far from the Reservation: The Transracial Adoption of American Indian Children* 37-38 (1972). These efforts resulted in the Indian Adoption Project, a program that placed several hundred Indian children with non-Indian families between 1958 and 1968. *Id.* at ix.

The adoption program began during an era when federal Indian policy promoted the termination of tribes and the assimilation of Indians. Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 1041 (1984). The goal of adoption was the same as that of the boarding schools: to assimilate Indian children and thereby improve the lot of the Indians by destroying their tribes and their culture. "If you want to solve the Indian problem you can do it in one generation," asserted a county attorney in Minnesota a few years

before the program got underway. "You can take all of our children of school age and move them bodily out of the Indian country and transport them to some other part of the United States. Where there are civilized people." Lila J. George, "Why the Need for the Indian Child Welfare Act?," in *The Challenge of Permanency Planning in a Multicultural Society* 165, 169 (Gary R. Anderson et al. eds. 1997).

The Indian Adoption Project was a small one, but it inspired a great deal of emulation. By the early 1970s, an astonishing number of Indian children were being placed for adoption in non-Indian families. Surveys of states with large Indian populations indicated that between 25 and 35 percent of Indian children had been separated from their families. Indian children were being adopted at per capita rates far higher than non-Indian children – thirteen times higher in Montana, sixteen times higher in South Dakota, and nineteen times higher in Washington. *The Destruction of American Indian Families*, *supra*, at 1.

When the American Indian Policy Review Commission submitted its final report to Congress in 1977, the Commission recognized that these adoptions were the modern incarnation of a very old practice. The Commission reported: "The policy of removing Indian children from their homes and tribal settings to 'civilize' them began in the 1880's with the advent of boarding schools. Indian children are still being removed from their tribal culture. Today, however, this is done through the adoption of Indian children by

non-Indian families." *American Indian Policy Review Commission: Final Report* 422 (1977). The Commission accordingly recommended legislation giving tribal courts jurisdiction over Indian child custody cases. *Id.* at 423.

There were many reasons for this explosion in Indian adoptions, but one of the reasons was a very old one. Social workers were generally unfamiliar with the common Indian practice of using the extended family to raise children. When social workers saw children under the care of adults who were not their parents, the social workers often misinterpreted this custom as evidence that the parents were guilty of neglect. *The Destruction of American Indian Families*, *supra*, at 43, 59. In one case, for instance, a social worker initiated adoption proceedings on the ground that a mother sometimes left her son with the child's great-grandmother. *Id.* at 3. Another case involved Robert Kewaygoshkum, the chairman of the Grand Traverse Band of Ottawa and Chippewa Indians, who spent his early childhood in the care of his grandfather. He was in the third grade when, as he later recalled, "one day a white lady came to the door and knocked on the door and said it was time to go." After being placed in a series of foster homes, he never saw his grandfather again. Matthew L.M. Fletcher, "The Indian Child Welfare Act: Implications for American Indian and Alaska Native Children, Families, and Communities," in *American Indian and Alaska Native Children and Mental Health* 275-77 (Michelle C. Sarche et al. eds. 2011).

When the Department of Health, Education, and Welfare studied the problem, its report concluded that "non-Indian social service providers often find it difficult to identify who is responsible for an Indian child and are frustrated by the mobility of the child, who may be the responsibility of different adults at different times." The report noted that "the children have a sense of family even if their parents are not present. However, if social workers fail to understand this system or insist on enforcing middle-class Anglo standards, they may intervene when Indians feel there is no reason for intervention." U.S. Department of Health, Education, and Welfare, *Indian Child Welfare: A State-of-the-Field Study*, DHEW Pub. 76-30096 (1976), at 16. A task force of the American Indian Policy Review Commission reached the same conclusion: "The social workers, who are usually untrained and have little or no understanding of Indian lifestyle or culture, make judgments concerning the adequacy of the Indian child's upbringing." *Report on Federal, State, and Tribal Jurisdiction: Task Force Four: Federal, State, and Tribal Jurisdiction: Final Report to the American Indian Policy Review Commission* 79 (1976). When social workers evaluated Indian parenting, "the evaluation process involves the imposition of cultural and familial values which are often opposed to values held by the Indian family." *Id.* at 80.

The generation of Indian children adopted in the 1960s and 1970s are the adults of today. Many still suffer from feelings of dislocation and a sense of not

belonging, the same effects that were often created by the boarding schools in earlier years.

B. U.S. policy formerly favored eradicating Indian tribes and Indian culture to facilitate the Indians' assimilation.

For most of American history, policymakers believed that the destruction of Indian tribes and Indian culture were necessary steps toward assimilation. "The assimilation campaign promised to destroy the Indians' ancient cultures," the leading historian of this campaign concludes, "but that destruction would serve what reformers believed was a greater good: the expansion of 'civilized' society." Frederick E. Hoxie, *A Final Promise: The Campaign to Assimilate the Indians, 1880-1920*, at 39 (1984).

Officials were certain that the institution of the tribe was retarding the Indians' progress. "We must as rapidly as possible break up the tribal organization," declared Merrill Gates, the chairman of the Board of Indian Commissioners. "Politically it is an anomaly – an *imperium in imperio*." *Americanizing the American Indians*, *supra*, at 52, 49. Gates predicted that "[a]s the allegiance to tribe and chieftain is weakened, its place should be taken by the sanctities of family life and an allegiance to the laws which grow naturally out of the family!" *Id.* at 51. As one official put it, "it is to be hoped that the time is not far distant when there will be as many bands as there are families; in other words, every head of a family

his own chief." *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1880*, at 41 (1880).

To stamp out Indian culture, the federal government prohibited traditional religious ceremonies and dances, regulated matters like hair length and funeral procedures, and required Indians to adopt personal names that would be easier for non-Indians to pronounce and remember. *Cohen's Handbook*, *supra*, at 75-78. Even the reorganization of Indian land tenure had a similar motive, as it was widely thought that the ownership of fee simple parcels would cause Indians to dispense with their tribes and their traditional ways of life and to take on cultural traits officials considered markers of civilization. Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* 260-68 (2005). "The allotment system tends to break up tribal relations," insisted Commissioner of Indian Affairs Hiram Price. "It has the effect of creating individuality, responsibility, and a desire to accumulate property. It teaches the Indians habits of industry and frugality." *Americanizing the American Indians*, *supra*, at 89.

Government policy toward Indian tribes and Indian culture would eventually change, at first temporarily in the 1930s and then permanently in the 1960s and 1970s. Prucha, *The Great Father*, *supra*, at 940-68, 1087-1170. Rather than seeking to eradicate Indian tribes and Indian culture, the government began trying to help Indians preserve them. The Indian

Child Welfare Act was an important part of this turnabout. *Id.* at 1153-57.

C. Because Congress intended ICWA to put a stop to these practices, the statute was drafted so that it may be invoked by all parents, whether or not custodial.

ICWA was not a quick fix for a short-term problem. It was a long-gestating effort to put a stop to several very old practices that had come to be understood as mistakes. Congress heard a great deal of evidence about how social workers were seizing Indian children from extended families on the ground that their parents were noncustodial. Many witnesses lamented how the loss of their children imperiled the continued existence of Indian tribes and Indian culture. In light of all this evidence, Congress drafted ICWA to protect all Indian children by making the statute available to custodial and noncustodial parents alike.

1. Congress enacted ICWA after hearing considerable evidence that one of the factors contributing to adoptions of Indian children was that social workers misinterpreted Indian childrearing practices as neglect.

In the hearings that led up to ICWA, Congress was informed again and again that social workers were removing Indian children from the care of their

extended families in the mistaken belief that proper child care required custodial parents. "In judging the fitness of a particular family," testified William Byler, the Executive Director of the Association on American Indian Affairs:

> many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.
>
> For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93d Cong., 2d Sess. 18 (1974) [1974 Hearings]. The Association on American Indian Affairs supported the bill that became ICWA because – as its lawyer testified – "Indian cultures universally recognize a very large extended family. Many relatives of Indian children are considered by tribal custom to be perfectly logical and able custodians of Indian children. This bill will require State

agencies and courts to recognize this extended family." *Indian Child Welfare Act of 1978: Hearings Before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. 69 (1978) [1978 Hearings].

Howard Tommie, the chair of the National Indian Health Board, likewise emphasized the frequency with which social workers misinterpreted as neglect the Indian custom of placing children in the care of adults other than their parents. *Indian Child Welfare Act of 1977: Hearing Before the U.S. S. Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. 316 (1977) [1977 Hearings].

Several witnesses provided detailed examples. Ramona Bennett, the chair of the Puyallup Tribe, told members of Congress about a resident of her own reservation, a "grandmother with a seventy year tradition of carrying water, boiling water, washing clothes, washing dishes, giving sponge baths, washing floors," and "generally maintaining an immaculate home." This grandmother would be a stricter disciplinarian than could be found in more affluent circumstances, Bennett observed, and yet "[u]nder the currently enforced 'standards' any children she is raising are subject to removal and placement by state agencies." 1977 Hearings at 166. Mike Ranco of the Central Maine Indian Association provided a similar example – his own grandmother, from whom the state tried to wrest custody of his brother, despite her success in raising five children, twenty-three grandchildren, and thirteen great-grandchildren. 1978 Hearings at

115. Goldie Denny of the Quinault Nation recalled her own childhood, when the state welfare department took her and her sister out of the home of their grandmother and father, simply for being found wading barefoot in mud puddles. 1977 Hearings at 77. Denny concluded: "We have lost a great number of children through foster care and adoption by non-Indian caseworkers who come upon the reservation and remove children for stupid reasons." *Id.* at 78.

All this testimony made a profound impression on the principal sponsors of the legislation that became ICWA. Senator James Abourezk, the chair of the Subcommittee on Indian Affairs, even interrupted a witness on one occasion to note that "it is pretty obvious that when a non-Indian social worker, or a non-Indian authority tries to impose their own standards on the Indian people and the Indian families, it is almost certainly doomed to failure, no matter what they try." 1974 Hearings at 47. By the end of the 1974 hearings, Senator Abourezk summarized the previous two days of testimony: "Witness after witness got up and testified that non-Indian social workers have been totally ignorant of exactly what an Indian family is and what it ought to be." 1974 Hearings at 449. On the Senate floor, Abourezk explained the need for legislation by referring to this testimony about how "the persons responsible for making decisions about child neglect may not be equipped by their professional training to decide whether or not a child is suffering emotional damage at home, in spite of conditions which might indicate neglect in an Anglo

middle-class home." 123 Cong. Rec. S10810 (June 27, 1977).

Representative Morris Udall, the bill's sponsor in the House, also discussed this testimony in explaining the need for legislation on the floor of the House. "Hearing witnesses reiterate time and again the failure or inability of State agencies, courts, and procedures to fairly consider the differing cultural and social norms in Indian communities and families," Udall observed. "Regrettably, public and private agency officials are all too often unfamiliar with and/or disdainful of Indian culture and society. Often the conditions which lead to separation are not demonstrably harmful." 124 Cong. Rec. H12849 (Oct. 14, 1978).

Both the House and Senate Committee Reports on the bills that became ICWA accordingly emphasized that the statute would put an end to these practices – broadly, an end to the ill-informed disrespect of Indian child care practices, and specifically, an end to the removal of Indian children on the ground that their parents were noncustodial. The House Report repeated verbatim the testimony of William Byler that "[m]any social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights." H.R. Rep. No. 95-1386, 95th Cong., 2d Sess., at 10 (1978). The Report explained that "[t]he concept of the extended family maintains its vitality and strength in

the Indian community. By custom and tradition, if not necessity, members of the extended family have definite responsibilities and duties in assisting in child-rearing. Yet, many non-Indian public and private agencies have tended to view custody of an Indian child by a member of the extended family as prima facie evidence of neglect." *Id.* at 20. The Senate Report reproduced portions of the Final Report of the American Indian Policy Review Commission, and portions of the report of one of the Commission's task forces, that made the same points. S. Rep. No. 95-597, 95th Cong., 1st Sess., at 39, 43-45 (1977).

Of course, many of the abuses that prompted the enactment of ICWA involved the removal of Indian children from custodial parents. But some of the abuses that prompted ICWA involved the removal of Indian children from families with noncustodial parents, precisely *because* the parents were noncustodial. These were among the adoptions ICWA was intended to end.

2. Congress enacted ICWA after hearing considerable evidence that the wholesale adoption of Indian children posed a threat to the very existence of Indian tribes and Indian culture.

Much of the evidence presented at the hearings leading up to ICWA concerned the damage that adoptions were inflicting on tribes, even apart from the damage inflicted on parents and children.

Several witnesses testified that they feared the disappearance of their tribes' culture, because the loss of so many children imperiled their ability to hand their culture down to the next generation. Calvin Isaac, the tribal chief of the Mississippi Band of Choctaw Indians, explained: "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people." 1977 Hearings at 157. Another witness lamented: "We are losing our children and our heritage." 1978 Hearings at 112. And another: "Indian children are not only physically deprived of their culture, but even their attitudes and ideas are turned against their traditional customs and lives." 1974 Hearings at 99.

This testimony had a powerful effect on the principal sponsors of ICWA, who cited the threat posed by adoptions to the survival of Indian tribes as one of the reasons the legislation was needed. "Indian cultures are being destroyed by this practice since so many Indian children are not learning Indian ways," Senator Abourezk declared on the Senate floor. 123 Cong. Rec. S10810 (June 27, 1977). "Their entire Indian way of life is smothered," he insisted on another occasion. "It has been called cultural genocide." 123 Cong. Rec. S5331 (Apr. 1, 1977). Representative Udall likewise observed: "There is nothing that is more central to the preservation of an Indian tribe and no resource that is more vital to its future than its

children. We could not more effectively and completely destroy an Indian tribe than by depriving them of their children." 124 Cong. Rec. H3560 (May 3, 1978).

One of the concerns that prompted ICWA was the harm to Indian parents and children caused by adoptions, but another concern was the harm done to tribes as political and cultural entities. While one purpose of ICWA was to protect Indian families, another purpose was to protect Indian tribes and Indian culture.

3. ICWA may accordingly be invoked by non-custodial parents.

Because one of the abuses ICWA was intended to stop was the removal of Indian children on the ground that their parents were not custodial, it would have made no sense for Congress to limit the statute's protections to custodial parents. This is why ICWA protects Indian children of all parents, without reference to whether the parents are custodial or noncustodial. The statute grants rights to anyone who is a "parent" of an "Indian child." 25 U.S.C. § 1912(a). The term "parent" is defined in ICWA without any requirement of custody – the definition explicitly requires acknowledgement or proof of *paternity* but is silent as to custody. 25 U.S.C. § 1903(9). Considering the historical background to ICWA, the irrelevance of custody is no surprise.

Nor is it any surprise that ICWA lacks any requirement of an "existing Indian family." One of the abuses that prompted the enactment of ICWA was the frequency with which state government employees and private adoption agencies imposed their own ideas of the family on Indians. It would have been ironic, to say the least, if Congress had responded to this problem by empowering state government employees and private adoption agencies to determine when an "Indian family" exists. Instead, ICWA does the far more sensible thing: it grants rights to parents without reference to whether parents live in arrangements others would recognize as families.

Indeed, parents are not the only ones who may invoke the protections of ICWA. Because one of the abuses ICWA was intended to stop was the destruction of Indian tribes as cultural and political entities, the statute grants rights to "the Indian child's tribe" as well. 25 U.S.C. §§ 1911(b), 1912(a), 1915(a). This term is also defined in the statute, again without any reference to custody. 25 U.S.C. § 1903(5). As this Court has explained, tribes may invoke the protections of ICWA even over the objection of *both* parents. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49-51 (1989).

The fact that ICWA protects tribes as well as parents makes even clearer that the statute may be invoked by noncustodial parents, because it would have made no sense for Congress to extend protection to tribes and custodial parents while simultaneously withholding protection from noncustodial parents.

The threat to the existence of Indian tribes from the loss of their children was equally serious whether any particular child was being raised by his parents or by another member of the extended family.

There is also a broader lesson in the record of government-backed efforts to have Indian children raised by non-Indian adults, a lesson that was well understood at the time ICWA was enacted but one that we are in danger of forgetting today. We all sympathize with young children, and we all want what is best for them. Where Indian children are concerned, however, these sympathies have a long and often unattractive history. They are the same sympathies that prompted generations of policymakers – including some who were just as well-intentioned as anyone alive today – to establish the boarding schools and adoption programs that caused so much harm to Indians. They are the sympathies that gave rise to the very policies ICWA was intended to stop.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 12-399

IN THE
Supreme Court of the United States

ADOPTIVE COUPLE,
Petitioners,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,
Respondents.

On Writ of Certiorari to the South Carolina Supreme Court

BRIEF FOR THE SEMINOLE NATION OF OKLAHOMA AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS, BIRTH FATHER AND THE CHEROKEE NATION

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INTERESTS OF THE SEMINOLE NATION

The Seminole Nation is an Indian Nation located in Seminole County, Oklahoma. [1] The Seminole Nation of Oklahoma is federally recognized by the Secretary of the Interior as a Native American Tribe for the purpose of government-to-government relations.[2] As of February, 2013, the Seminole Nation has over 18,000 citizens. Seminole County, Oklahoma, is a checkerboard of tribal trust property, Indian allotments, restricted Indian lands, and dependent Indian communities. Native Americans make up at least 22% of the population of Seminole County.

The Seminole Nation is particularly concerned that this Court's decision will impact its ability to participate in child custody proceedings involving its citizens, and more importantly, its children. As Congress found, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." [3] Through its children, the Seminole Nation is able to pass on its culture, customs, and governmental principles. If this Court thwarts the protections provided by

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirm that no counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus* and their counsel made such monetary contributions. Pursuant to this Court's Rule 37.2, letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] Federal Register / Vol. 77, No. 155/ Friday, August 10, 2012.

[3] 25 U.S.C. § 1901(3).

Congress pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (the "ICWA"), the Seminole Nation is concerned it will lose connection to some of its precious children, no matter how remote that connection may be. Over time, if the only children Indian Nations may protect are those adjudicated in their own courts or born in their own territory, the Indian Nations will eventually cease to exist.

As a government, the Seminole Nation has an interest in protecting its children and ensuring they remain connected to the Nation. Its children, its future citizens, future government officials, future legislators, and future Chiefs, are vital to its continued existence. The ICWA is one of Congress' chosen mechanisms in protecting these interests.

SUMMARY OF THE ARGUMENT

Congress has chosen to pursue a policy of developing strong, effective, capable Indian Nation governments through self-determination. In furtherance of Congress' policy, Tribal self-determination is reflected in the constitutional governments that not only determine who may be citizens, but also establish legislative, executive and judiciary branches. The Indian Nations have worked to self-sustain their governments. In light of these efforts, *inter alia*, this Court determined long ago that Indian Nations are political in nature.[4]

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[4] *Cherokee Nation v. Georgia*, 30 U.S. 1, 8 L. Ed. 25 (1831); *See also United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886); *United States. v. Sandoval*, 231 U.S. 28, 46, 34 S. Ct. 1, 6, 58 L. Ed. 107 (1913).

In addition to establishing a policy of self-determination, Congress recognized that future citizens are an indispensable component of any of these governments.[5] The ICWA is one of the means and mechanisms of pursuing this Congressional policy. Congress has enabled Indian Nations to provide opportunities for Indian children to be future citizens, thereby assuring that the component of citizenry, indispensable to any government, continues to exist.[6]

Deciding upon the mechanism to ensure that future citizens have a connection to the Nation, and given that control of Indian affairs is exclusively within the power of Congress, Congress, *inter alia*, chose to impose upon the States Federal standards in child custody proceedings which require the inclusion of Indian Nations and apply Federal standards to parents of an Indian child. In furtherance of these goals, the ICWA provides a Federal definition of "parent" and "Indian child". Through the ICWA protections, an Indian Nation is provided the ability to interpose its interests in child custody proceedings in State courts.[7]

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[5] 25 U.S.C. § 1901(3).

[6] *Id.*

[7] *United States v. Jicarilla Apache Nation*, ___ U.S. ___, 131 S. Ct. 2313, 2325, 180 L. Ed. 2d 187 (2011) (*citing Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 8 L.Ed. 25 (1831); *Heckman v. United States*, 224 U.S. 413, 444, 32 S. Ct. 424, 434, 56 L. Ed. 820 (1912); *United States v. Sandoval*, 231 U.S. 28, 48, 34 S.Ct. 1, 6, 58 L.Ed. 107 (1913).

This Court cannot impose limits or change Congress' chosen means and mechanisms, which were enacted to further Congress' goal in protecting Indian children, parents of Indian children, and Indian Nations. The policy with regard to Indian Nations and Indian people is a decision for Congress to make via legislation and requires deference from the Court.[8]

By allowing the Indian Nation to participate in custody proceedings, its interests are protected by ensuring the child remains connected to the Nation in a safe, Indian home. Moreover, Congress balanced the Nation's rights by requiring Courts to determine that custody by the parent of an Indian child would not "result in serious emotional or physical damage to the child."[9]

Thus, under the express terms of the ICWA, Congress requires the application and protection of Federal standards and definitions to the parents of an Indian child and Indian Nations in child custody proceedings. In termination proceedings, the ICWA will only allow the termination of parental rights where: (1) "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful";[10] and (2) "that the continued custody of the child by the parent or Indian custodian is likely to result in

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[8] *Jicarilla Apache Nation, supra.*
[9] 25 U.S.C. § 1912(e).
[10] 25 U.S.C. § 1912(d).

serious emotional or physical damage to the child".[11] Moreover, the ICWA grants authority to an Indian Nation to intervene in State court proceedings "to invalidate such action [by the court] upon a showing that such action violated any provision of sections 1911, 1912, and 1913" of the ICWA.[12] In furtherance of this provision, the ICWA provides Federal definitions of "parent" and "Indian child." An Indian child, under the Federal definition, not only includes enrolled citizens of an Indian Nation, but also children that are eligible to be enrolled.[13]

These Federal standards and protections fulfill the United States' moral and legal obligations to the Indian Nations, which have been entrusted exclusively to Congress. Moreover, the ICWA ensures that an Indian Nation can protect its children. It ensures the children are in a safe home and a home that will have some connection to the Nation. The ICWA also ensures the right that a child and a citizen parent "have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, their [government]."[14]

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[11] 25 U.S.C. § 1912(f).
[12] 25 U.S.C. § 1914.
[13] 25 U.S.C. § 1903(4).
[14] *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 64-65, 121 S. Ct. 2053, 2061, 150 L. Ed. 2d 115 (2001).

Based on the express terms of the ICWA and Congressional policy, there can be little doubt the ICWA was meant to confer indispensable rights to parents of Indian children and to Indian Nations to prevent the loss of Indian citizens, or, at the very least the opportunity of those children to be citizens. In the instant case, if the ICWA is not followed, Baby Girl will be lost to the Cherokee Nation. The very purpose of the ICWA was precisely to prevent such a loss from occurring.

FACTUAL BACKGROUND OF THE CASE

The events that led to the South Carolina courts' placement of Baby Girl with her Father are recounted in Father's brief and supplemented by the Cherokee Nation. The Seminole Nation incorporates those statements herein by reference.

ARGUMENT AND AUTHORITY

The Seminole Nation of Oklahoma requests this Court affirm the decision of the South Carolina Supreme Court. A parent of an Indian child and an Indian Nation are permitted to invoke the protections of the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* ("ICWA"), in order to preserve the Indian heritage of their child and ensure the continuance of future citizenry for the Indian Nation. The ICWA provides Federal standards which govern and control in custody proceedings involving Indian children, which are necessary to prevent the loss of Indian children to their Indian Nations. Congress has determined these Federal standards are also

necessary to fulfill its trust obligations to Indian people. These policy decisions are within Congress' exclusive province and must be respected by the Courts. The ICWA's protections not only safeguard a child's right to her Indian citizenship, but also the Indian Nation's interest in protecting its children and maintaining a bond in order to pass along its government, culture and traditions to future generations. The ICWA was established to ensure Indian children were not lost to their Indian Nation.

A. Historical Framework

In order to understand the backdrop of the ICWA, a brief history of the development of Indian Nations and the trust relationship between the United States and the Indian Nations is necessary. The History of the Seminole Nation is demonstrative of the histories of many Indian Nations.

1. History of the Seminole Nation

The Seminole Nation originally occupied, in large part, the current State of Florida. In the early 1800s, the United States adopted a policy to remove Indians to Indian Territory to free up land for white settlements. Indian Territory is presently the State of Oklahoma. The majority of Seminoles were first removed as a result of the Treaty of Payne's Landing, with the first group arriving in Oklahoma in 1836.[15]

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[15] 7 Stat. 368 (May 9, 1832).

By 1839, most of the Seminole had been relocated to Indian Territory. In 1842, the Seminoles numbered about 3,612 members. The Seminoles were originally located within the Creek Nation's territory. However, in 1856, the Seminole signed a treaty with the Creek Nation and the United States to establish a separate territory for the Seminole Nation.[16]

By 1890, the United States decided to open up Indian Territory for white settlement and adopted a policy to survey Indian tribal land and divide it into allotments for individual Indians. However, pursuant to treaties with the Seminole Nation and the other Five Tribes (the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation and the Creek Nation) (collectively, the "Five Tribes"), the United States did not have authority to simply allot their fee lands like they did with many other Indian Nations.[17] Thus, in 1893, the Dawes Commission was created to force the Seminole Nation, along with the other Five Tribes, to agree to an allotment plan. In addition, this Commission registered the members of the Five Tribes on a census that is now known as the "Dawes Rolls."

In 1898, the Seminole Nation entered into an allotment plan with the United States.[18] This agreement was never put into full effect because the

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[16] 11 Stat. 699 (Aug. 7, 1856).

[17] *See Woodward v. De Graffenried*, 238 U.S. 284, 294, 35 S.Ct. 764, 768, 59 L.Ed. 1310 (1915).

[18] 30 Stat. 567 (July 1, 1898).

United States changed policy again with respect to the Indian Nations.

Thus, the Seminole Nation continued in existence. Between 1900 and into the 1960s, the United States selected and approved the Seminole Nation's Chief. The Seminole Nation's government, along with many of the other Indian Nation Governments, continued in existence and to function. The Seminole Chiefs approved allotment deeds and various leases for land use and oil and gas exploration. They also handled the day-to-day functions of tribal government. This activity was authorized by Congress in furtherance of its guardian-ward relationship with the Indian Nations, as explained below.

In the 1930s, Congress enacted the Indian Reorganization Act in an attempt to renew and reinvigorate tribal self-governance.[19] The United States' policy of local self-government encouraged many Indian Nations to adopt constitutions. This policy is referred to as "self-determination." In implementing this policy, Congress provided federal recognition to various Nations for purposes of establishing government-to-government relations.

However, the self-determination authority provided by Congress was not unlimited. Not every tribe may be an Indian Nation. In *United States v. Sandoval*, 231 U.S. 28, 46, 34 S. Ct. 1, 6, 58 L. Ed. 107 (1913), this Court warned, "it is not... that

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[19] 25 U.S.C. § 461 *et seq.*

Congress may bring a community or body of people within range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes." The Bureau of Indian affairs, as authorized by Congress, eventually laid out seven criteria to determine if an Indian Nation could receive formal federal recognition and protection.[20]

Because the Seminole Nation maintained a relationship with the United States, it, along with the other Five Tribes, has long been formally recognized by the Federal Government for purposes of government-to-government relations. Moreover,

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[20] To be recognized by the Federal Government, an Indian Nation must establish:

1) that observers identified the Indian Nation as an American Indian entity on a substantially continuous basis since 1900;
2) that a predominant portion of the Indian Nation has comprised a distinct community since historical times;
3) that the Indian Nation has maintained political influence over its members as an autonomous entity since historical times;
4) that the Indian Nation provide a copy of its governing document;
5) that the Indian Nation's members descend from a historical Indian tribe;
6) that the Indian Nation's membership be composed principally of persons who are not members of another Federally recognized Indian tribe; and
7) that the Indian Nation not be subject to legislation forbidding the Federal relationship.

25 C.F.R. Part 83, § 83.7.

the Seminole Nation replaced their former government with a Constitution on March 8, 1969, which the Commission of Indian Affairs approved on April 15, 1969. That Constitution was subsequently amended on February 25, 1989, December 14, 1991, and September 20, 2008.

It is established that an Indian Nation has the ability to determine its own membership.[21] Under the Seminole Nation's Constitution, citizenship is determined by descendancy.[22] The other four Five Tribes adopted similar Constitutional provisions.[23]

Moreover, even the United States recognizes citizenship by descendancy. This Court has found that an important government interest is protected by the United State's citizenship statues "to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[24] In furtherance of this goal, the United States grants citizenship to children born outside the territorial confines of the United States based solely

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[21] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).

[22] § 1, ART. II, SEMINOLE NATION CONSTITUTION.

[23] § 1, ART. II, CHICKASAW NATION CONSTITUTION; § 1, ART. II, CHOCTAW NATION CONSTITUTION; § 2, ART. III, MUSCOGEE (CREEK) NATION CONSTITUTION, § 1, ART. IV, CHEROKEE NATION CONSTITUTION.

[24] *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 64-65, 121 S. Ct. 2053, 2061, 150 L. Ed. 2d 115 (2001).

on the child's parentage.[25] For example, Federal law provides "a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person."[26] Thus, the requirements for citizenship of those born outside the United States are dependent upon the citizenship of the child's parents.

In addition to establishing membership, the Seminole Nation, through its Constitution, established the rules and format of its legislature, executive and judiciary. The Seminole Nation, as with all federally recognized Indian Nations, is a functioning government. Under the Seminole Nation Constitution, its citizens are divided into fourteen bands, twelve original bands and two Freedman bands. The Seminole maintain a republican form of government and conduct democratic elections every four years to elect two Representatives from each of the fourteen bands to serve on the Seminole General Council. The Council, chaired by the Principal Chief or Assistant Chief, serves as the governing body of the Seminole. The General Council meets at least eight times a year at the council house on the Mekusukey Mission Tribal Grounds, located on trust land south of Seminole, Oklahoma, to handle the Nation's business.

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[25] 8 U.S.C. § 1401.

[26] *Id.*

The Seminole Nation and its citizens, the Seminole, have endured for thousands of years. They are a political body of people that needs its citizens to remain connected to the Nation.

2. History of Congressional Authority over Indians and Indian Nations

> *The Federal trust responsibility to American Indians is one of the most important as well as most misunderstood concepts in Federal-Indian relations.*[27]

The history of the trust relationship between the United States and tribal governments extends back to the foundation of the Republic, beginning with the Indian Commerce Clause of the Constitution of the United States. [28] Although straightforward in concept, the legal contours of the relationship are somewhat complex given the multiple treaties, statutes, regulations, court decisions and federal policy changes that have impacted the relationship.

Soon after the Constitution was ratified, Congress moved to assume control over Indian trade, beginning with *An Act to Regulate Trade and*

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[27] American Indian Policy Review Commission of the Congress of the United States, Final Report, May 17, 1977, vol. 1, page 125.

[28] "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. ART. I, § 3, CL. 8.

Intercourse With the Indian Tribes. [29] Congress established Federal control over Indian Nations and their citizens and applied various laws of the United States to Indian Nations and their citizens.

As for the Seminole Nation specifically, in 1823 the United States assumed specific fiduciary obligations in the Treaty with Florida Indians. Under that treaty, the Seminole Nation "promised to continue under, the protection of the United States, and of no other nation, power, or sovereign." This established a trust relationship with the United States that has continued through numerous subsequent acts.[30]

Based on the acts of Congress and treaties with the Indian Nations, this Court has affirmed over and over again that there is an "undisputed existence of a general trust relationship between the United States and the Indian people." [31] "The Government, following 'a humane and self-imposed policy ... has charged itself with moral obligations of the highest responsibility and trust,' obligations 'to the fulfillment of which the national honor has been committed.'" [32] In that vein, the Indian Nations,

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[29] 1 Stat. 137, 138 (July 22, 1790).

[30] *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 2972, 77 L. Ed. 2d 580 (1983); *Cobell v. Norton*, 240 F.3d 1081(D.C. Cir. 2001).

[31] *United States v. Jicarilla Apache Nation*, __ U.S. ___, 131 S. Ct. 2313, 2324, 180 L. Ed. 2d 187 (2011) (citing *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 2972, 77 L. Ed. 2d 580 (1983).

[32] *Jicarilla Apache Nation, supra*, (citing *Seminole Nation v. United States*, 316 U.S. 286, 62 S.Ct. 1049, 86 L.Ed. 1480

under the law, are described as "'domestic dependent nations,' under the 'tutelage' of the United States and subject to 'the exercise of the Government's guardianship over ... their affairs.'"[33] This does not go so far as create a common law trust relationship.[34] Rather, it is one solely defined by, and within the exclusive authority of Congress.[35]

B. The Policy Behind The Indian Child Welfare Act

Under its general trust obligations to the Indian Nations, Congress enacted the ICWA, making the following findings:

> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--
> **(1)** that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority,

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(1942); and *Heckman v. United States*, 224 U.S. 413, 437, 32 S. Ct. 424, 434, 56 L. Ed. 820 (1912)).

[33] *Jicarilla Apache Nation*, 131 S. Ct. at 2325 (*citing Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 8 L.Ed. 25 (1831); *Heckman v. United States*, 224 U.S. 413, 444, 32 S. Ct. 424, 434, 56 L. Ed. 820 (1912); and *United States v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913)).

[34] *Id.*

[35] *Id.*

Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social

> standards prevailing in Indian communities and families.[36]

Congress chose, under the ICWA, to confer more rights to Indian Nations and parents of Indian children than what they might otherwise be afforded under State law. In making this choice, Congress was merely fulfilling its long-standing trust obligations by permitting an Indian Nation the authority to exercise its interest in its citizens residing within the United States. Moreover, to ensure its citizens were not lost to it, Congress broadly defined those people covered by the Act. Congress' stated policy was:

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum **Federal standards** for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. (Emphasis added)[37]

In construing the policy behind the ICWA, this Court held that:

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[36] 25 U.S.C. § 1901.
[37] 25 U.S.C. § 1902.

> The ICWA thus, in the words of the House Report accompanying it, "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." House Report, at 23, U.S.Code Cong. & Admin.News 1978, at 7546. It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," *ibid.*, and by making sure that Indian child welfare determinations are not based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family." *Id.*, at 24, U.S.Code Cong. & Admin.News 1978, at 7546[38]

Congress, through the ICWA, created Federal standards, intended to trump State law, in order to accomplish Congress' obligations flowing from the trust relationship with the Indian people and Indian Nations.

C. The ICWA Provides the Necessary Mechanism to Ensure Indian Nation Involvement in State Court Child Custody Proceedings

The statutory protections of the ICWA ensure that the child is not lost to the Indian Nation. The

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[38] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37, 109 S. Ct. 1597, 1602, 104 L. Ed. 2d 29 (1989).

Act ensures that an Indian Nation and the Indian child will have an opportunity to develop a connection as a future citizen and government. These protections fulfill the United States' moral and legal obligations to Indian Nations and Indian people.

The Indian Nations have two important governmental interests. First, as *parens patriae*, the Indian Nation's goal is to provide the child with a permanent home.[39] Additionally, the Indian Nation's goal is "to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the [government]" [40] That *parens patriae* interest favors preservation, not severance, of natural familial bonds. [41] The ICWA is the mechanism Congress chose for Indian Nations to provide opportunities for Indian children to be future citizens and assure that the component of citizenry, indispensable to any government, shall perpetuate.

At issue in this case are two provisions that are determinative of the rights of a parent of an Indian child - 25 U.S.C. § 1912(d) and 25 U.S.C. §1912(f). Those sections provide that in order to

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[39] *Santosky v. Kramer*, 455 U.S. 745, 766, 102 S. Ct. 1388, 1401, 71 L. Ed. 2d 599 (1982).

[40] *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 64-65, 121 S. Ct. 2053, 2061, 150 L. Ed. 2d 115 (2001).

[41] *Santosky*, 455 U.S. at 766-67, 102 S. Ct. at 1401-02.

involuntarily terminate parental rights, the Court must find that:

> (1) active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and
> (2) that these efforts have proved unsuccessful[.]"[42]

In addition, the Court must also determine that "the continued custody of the child by the parent ... is likely to result in serious emotional or physical damage to the child."[43]

Thus, key to these protections are the determination of who constitutes an "Indian child," who the "parents" of an Indian child are and the child's "Indian tribe." In construing the ICWA, this Court will assume that "the ordinary meaning of that language accurately expresses the legislative purpose." [44] "We must enforce plain and unambiguous statutory language according to its terms."[45] "In determining the meaning of a statute,

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[42] 25 U.S.C. §1912(d).
[43] 25 U.S.C. § 1912(e).
[44] *Hardt v. Reliance Standard Life Ins. Co.*, __ U.S. __, 130 S. Ct. 2149, 2156, 176 L. Ed. 2d 998 (2010)(quoting *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 129 S.Ct. 2343, 2350, 174 L.Ed.2d 119 (2009)).
[45] *Id.*

'[this Court] look[s] first to its language, giving the words used their ordinary meaning.'"[46]

The ICWA provides a Federal definition of "Indian child" and "parent." An "Indian child" is defined as "any unmarried person who is under age eighteen and is ... eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[47] A "parent" is defined as "any biological parent ... of an Indian child."[48] However, in the case of unwed parents, the ICWA requires that the unwed father acknowledge or establish paternity.[49]

The ICWA does not leave the child without protection, either. The ICWA carefully balances its expanded parental rights against the child's rights. The child's rights are protected by requiring a showing that custody by the parent would not "result in serious emotional or physical damage to the child."[50]

The child's Indian tribe is afforded an interest in the proceeding, as well. The ICWA provides "any Indian child who is the subject of any action for ... termination of parental rights under State law, any parent...from whose custody such child was removed,

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[46] *Levin v. United States*, __ U.S. __, 133 S. Ct. 1224, 1231 (2013)(qoting *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990)).
[47] 25 U.S.C. § 1903(4).
[48] *Id.* at (9).
[49] *Id.*
[50] 25 U.S.C. 1912(e).

and **the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913**" of the ICWA.[51] This section is necessary for the Indian Nation to interpose its interest in the State court proceedings. This section provides the Indian Nation the ability to provide its citizen with a safe home that will also keep a connection with the Nation.

CONCLUSION

This Court must not let Indian children lose their opportunity to become citizens and members of their Indian community. Congress, through the ICWA and in exercising its trust responsibilities, has ensured that Indians and Indian Nations will enjoy heightened protection in child custody proceedings under the ICWA. Native Americans have endured much through their shared history. They were forcibly removed from their homes to Oklahoma and many other parts of this country. The abuses to Indian peoples and Indian Nations are well documented. Congress recognized that without the children - future citizens of the Indian Nation - Indian Nations lose their culture and heritage and eventually the Nations would cease to exist. The ICWA ensures that these Indian Nations, indigenous to this country and to which this Nation's honor has been committed, will not perish from this earth.

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[51] 25 U.S.C. § 1914 (emphasis added).

Respectfully submitted,

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AMICUS CURIAE BRIEF

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ADOPTIVE COUPLE,
Petitioners,

v.

BABY GIRL, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF *AMICUS CURIAE* SEMINOLE TRIBE OF FLORIDA, *ET AL.*, IN SUPPORT OF RESPONDENTS

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Metlakatla Indian Community;

National Council of Urban Indian Health;

National Indian Education Association;

National Indian Head Start Directors Association;

Native American Rehabilitation Association
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Northern Arapaho Tribe;

Pala Band of Mission Indians;

Pueblo of Acoma;

Southern Ute Indian Tribe;

Suquamish Tribe;

Swinomish Indian Tribal Community;

United South and Eastern Tribes, Inc.;

Ysleta del Sur Pueblo

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INTEREST OF *AMICI CURIAE*[1]

The 70 tribes from across the nation who are *amici* or members of *amici* tribal organizations filing this brief are deeply involved in the administration of the Indian Child Welfare Act and have a strong interest in the outcome of this case.

Amici Seminole Tribe of Florida, Catawba Indian Nation, Confederated Tribes of the Colville Reservation, Confederated Tribes of the Umatilla Indian Reservation, Coquille Indian Tribe, Jamestown S'Klallam Tribe, The Klamath Tribes, Lytton Rancheria, Metlakatla Indian Community, Nooksack Indian Tribe, Northern Arapaho Tribe, Pala Band of Mission Indians, Pueblo of Acoma, Southern Ute Indian Tribe, Suquamish Tribe, Swinomish Indian Tribal Community, and Ysleta del Sur Pueblo are federally recognized Tribes.

Amici All Indian Pueblo Council, Maniilaq Association, and United South and Eastern Tribes, Inc. are tribal organizations representing consortiums of federally recognized Tribes. A list of the member Tribes of each *amicus* tribal organization is attached in the Appendix to this brief. *Amici* National Council of Urban Indian Health, National Indian Education Association, National Indian Head Start Directors Association, and Native American Rehabilitation Association of the Northwest, Inc., are organizations representing consortiums of tribal and related programs or individuals substantially involved in providing services to Indian children.

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[1] The parties have filed blanket consents to the filing of amicus briefs in this case. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

As federally recognized Tribes and Indian or tribal organizations, *amici* have extensive knowledge and experience with regard to the operation of the Indian Child Welfare Act (ICWA). In particular, *amici* have first-hand knowledge of ICWA's importance in protecting Indian children's citizenship ties to their Tribes. The realization and protection of these citizenship ties is critical both to tribal self-governance and to the full exercise of the rights and responsibilities available to Indian children eligible for tribal citizenship. Accordingly, *amici* have a strong interest in ensuring the proper and constitutional interpretation of ICWA as legislation protecting tribal citizenship.

Amici also have a strong interest in the constitutional standard of review that is applied by the courts to Indian affairs legislation, including ICWA. As *amici* are particularly well-positioned to explain, federal legislation with regard to Indian Tribes is constitutionally unique and involves special considerations not applicable to legislation creating racial classifications. Petitioners and the Guardian ad Litem largely disregard these special constitutional considerations in their arguments. If this Court reaches the constitutional questions raised by Petitioners and the Guardian ad Litem in this case, *amici* believe this brief will aid the court in evaluating those questions as they concern the appropriate constitutional standard of review.

SUMMARY OF ARGUMENT

In 1978, in response to widespread abuses involving the adoption of Indian children, Congress enacted the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-1963. ICWA applies to children who are enrolled members of federally recognized Indian

Tribes, or eligible for membership and born to enrolled members of those Tribes. 25 U.S.C. § 1903(4). Through such provisions as setting the minimum standards for the termination of parental rights, ICWA sought "to protect the rights of the Indian child as an Indian and the rights of the Indian community and Tribe in retaining its children in its society." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989) (quoting H.R. Rep. No. 95-1386, at 23 (1978)). ICWA's fundamental protection of tribal citizenship was a recognition by Congress that the loss of citizens and potential citizens through the widespread adoption of Indian children by non-Indians not only actually diminished the population of Tribes, but also deprived Tribes of leaders, advocates, and political and cultural participants. Such loss was found to "seriously undercut the Tribes' ability to continue as self-governing communities." *Id.* at 34.

The briefs for the Petitioners and the Guardian ad Litem ("Guardian" or "GAL") argue that the application of ICWA by the court below raises grave constitutional concerns. *See* Pet. Br. at 43; GAL Br. at 48. Their arguments, however, rest on a mischaracterization of the governing constitutional standard this Court has established for review of federal Indian legislation – a standard that is responsive to the unique constitutional challenges presented by such legislation.[2] *See Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84-85 (1977); *United States v. Antelope*, 430 U.S. 641, 645 (1977); *Rice v. Cayetano*, 528 U.S. 495, 520 (2000). It is that standard which

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[2] That standard is referred to in this brief as the "Indian rational basis standard of review."

should be applied to answer the constitutional questions Petitioners and the Guardian raise.

Attempting to invoke strict scrutiny review, the Petitioners and the Guardian repeatedly claim that ICWA was applied in this case solely on the basis of race or ancestry. They ask this Court to create and apply a rigid distinction between purely ancestral Indian classifications on the one hand and purely non-ancestral Indian classifications on the other hand. However, they fail to advance a clear or principled method for making the distinction they urge or to fully account for Congress's well-acknowledged powers to legislate with respect to Indians as a uniquely separate category under the Constitution. They also fail to recognize the inherent difficulties in the approach they advance, which would ignore the political significance of tribal citizenship and impose subjective cultural criteria to determine the constitutionality of legislation with respect to Indians.

Simply put, the Petitioners' and Guardian's approach is both impractical and contrary to precedent. It is also unnecessary. That is because the established constitutional standard of review for Indian classifications already ensures that Congressional action does not exceed the bounds of Congress's Indian affairs power or impinge on individual constitutional protections. The standard, firmly rooted in history, the Constitution, and strong legal precedent, only requires that legislation "be tied rationally to the fulfillment of Congress's unique obligations toward the Indians." *Weeks*, 430 U.S. at 85 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535 (1974)).

Both on its face and as applied in this case, ICWA has the specific purpose and effect of protecting tribal

citizenship, which is itself at the core of tribal self-government. The Act not only meets the proper Indian rational basis standard of review, but it falls within Congress's constitutional powers "to further Indian self-government" acknowledged by the Guardian and Petitioners themselves. Pet. Br. at 46; GAL Br. at 54.

ARGUMENT

I. The constitutionality of ICWA as applied in this case should be determined under this Court's precedents recognizing the wide breadth of Congress's constitutional Indian affairs powers, which account for equal protection limitations.

The Petitioners and the Guardian argue that the application of ICWA by the court below raises serious constitutional concerns with regard to equal protection.[3] Pet. Br. at 44; GAL Br. at 53. Their argument does not, however, provide a clear or consistent statement of or rationale for the standard of review they advance. The Petitioners and Guardian acknowledge that the standard of review must account not only for the Constitution's guarantee of equal protection, but also for its grant of congressional power over Indian affairs specifically. They suggest that these constitutional principles are in tension and must be balanced, but they do not

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[3] The Petitioners and Guardian also advance arguments relating to fundamental liberty interests under the Due Process Clause of the Fifth Amendment, as well as the Tenth Amendment and federalism principles. To the extent not covered in this brief, *amici* agree with the responses of the Cherokee Nation and the Father as to these arguments. *See* Resp't Cherokee Nation Br. at 47-53; Resp't Birth Father Br. at 51-54.

provide a coherent analysis of how that balancing should be accomplished. *See* Pet. Br. at 44; GAL Br. at 54. They are instead content to simply proclaim that the application of ICWA by the court below was based solely on race or ancestry, and therefore should be subject to "strict scrutiny" and overturned. Pet. Br. at 44; GAL Br. at 54-55.

The Petitioners' and Guardian's reliance on strict scrutiny in this case is misplaced. This Court has established and repeatedly applied a constitutional standard of review that governs Congressional action over Indians and Indian affairs. Under that standard, such federal legislation is deemed constitutional if it is "tied rationally to the fulfillment of Congress's unique obligations toward the Indians." *Mancari*, 417 U.S. at 555 (1974). Where the standard is met, legislation cannot be viewed as based on impermissible racial classifications but is to be upheld under Congress's broad constitutional Indian affairs authority.

The Indian rational basis standard of review is necessarily different from standards applied to Congressional action classifying persons other than Indians. Indians occupy a "sui generis" status within the United States and receive singular treatment in the United States Constitution as the subjects of unique legislative protection and regulation. *Mancari*, 417 U.S. at 551-52 (1974); *United States v. Lara*, 541 U.S. 193, 200-01 (2004).[4] Those powers are expansive

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[4] Congressional power over Indian affairs is generally described as flowing explicitly and implicitly from the Indian Commerce Clause, art. I, § 8, cl. 3, the war and treaty powers, the property clause of Article IV, and others, as well "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government" and the general nature of

and have been "consistently described as 'plenary and exclusive'" by this Court. *Lara*, 541 U.S. at 200. As a result, both federal and state courts over the years have consistently acknowledged and respected Congress's broad authority to legislate with respect to Indians. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323-24 (2011); *Matter of Guardianship of D.L.L.*, 291 N.W.2d 278, 281 (S.D. 1980).

The treatment of Indians in our constitutional system is exceptional and well justified by history. Unlike any other segment of the population in the United States, Indians existed in North America in self-governing societies prior to the formation of the United States, and were not participants in the creation of its government. *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1831).[5] From the beginning,

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the relationship between Indian Tribes and the United States. *Lara*, 541 U.S. at 200-01. *See also Mancari*, 417 U.S. at 551-52; *Cohen's Handbook of Federal Indian Law* §§ 5.01-5.02 (Nell Jessup Newton ed., 2012) [hereinafter, *Cohen's Handbook*] (explaining the constitutional sources and scope of federal power over Indians). For ease of reference, we will refer to the broad authority from these several sources as Congress's constitutional, or constitutionally based, powers over Indian affairs.

[5] When the United States was established, Indian tribes were recognized as separate and their preexisting governing institutions served as a source of inspiration for the Framers. In 1988 the Senate and the House of Representatives underscored this fact in a concurrent resolution resolving that "the Congress, on the occasion of the two hundredth anniversary of the signing of the United States Constitution, acknowledges the contributions made by the Iroquois Confederacy and other Indian Nations to the formation and development of the United States;" and further resolving that the Congress "hereby reaffirms the constitutionally recognized government-to-government relationship with Indian Tribes which has been the cornerstone of this

the Founders of the United States chose to respect the political status of the Indian Tribes they encountered, and to preserve and protect it for their children and their children's children. *See* Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153, 164 (2008). Indeed, "[t]he historical record for the period encompassing, at the very least, 1763 through the Articles of Confederation, the Constitution, and even the ratification of the Fourteenth Amendment, provides remarkably unambiguous support for the proposition that the original understanding of the Framers was that Indian affairs must be dealt with in the context of tribal political relationships with the federal government."[6] *Id.* at 180.

The courts do, however, review Congressional action to ensure that it does not violate constitutional requirements by exceeding the reasonable bounds of Congress's Indian affairs powers. *Weeks*, 430 U.S. at 84-85. That is the function of the Indian rational basis standard of review, as articulated and applied in Supreme Court cases including *Mancari*, 417 U.S. at 555, *Weeks*, 430 U.S. at 84-85, *Moe v. Confederated*

Nation's official Indian policy; ..." H.R. Con. Res. 331, 100th Cong. (1988) (enacted).

[6] Congress continues to enact legislation, consistent with the Framers' original understanding, that expressly recognizes the unique political status and governmental power of Tribes. For example, the 113th Congress recently passed legislation to recognize and affirm tribal special domestic violence criminal jurisdiction over non-Indians, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904 (2013), which the Court had previously ruled is within Congress's constitutional powers. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (it is for Congress to decide "whether Indian Tribes should finally be authorized to try non-Indians.").

Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 480 (1976), and *Antelope*, 430 U.S. at 645. Where this standard is met, nothing more need be shown for this Court to determine that an Act of Congress, as applied or on its face, passes constitutional muster. *Weeks*, 430 U.S. at 85.

While Petitioners and the Guardian acknowledge this well-settled standard of review, they argue that before the courts may apply the standard, the guarantee of equal protection requires a threshold determination that the differential treatment is not "predicated solely on 'ancestral' classification." Pet. Br. at 44; *See also* GAL Br. at 53-54. This argument reflects a fundamental misunderstanding of the justification, purpose, and function of the Indian rational basis standard. That standard does not require a threshold determination that the classification is non-ancestral in nature, because the standard itself is designed to ensure that Congressional action with respect to Indians does not exceed Congress's proper constitutional authority. So long as legislation does not exceed that authority, it cannot be deemed to violate equal protection.[7]

This Court fully explained the function of the Indian rational basis standard of review in *Delaware Tribal Bus. Comm. v. Weeks*, *supra*. In *Weeks*, a group of Delaware Indians that had been excluded

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[7] "In other words, in a sense the Constitution itself establishes the rationality of the present classification, by providing a separate federal power which reaches only the present group. ... '[T]he Constitution itself provides support for legislation directed specifically at the Indian Tribes.... [T]he Constitution therefore singles Indians out as a proper subject for separate legislation.'" *United States v. Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (citing *Antelope*, 430 U.S. at 649 n.11).

from the distribution of judgment funds pursuant to an Act of Congress challenged their exclusion on equal protection grounds. 430 U.S. at 75. Appellants, Delaware Indians who were included in the distribution, argued that "Congress's pervasive authority...to control tribal property" precluded judicial review of the Act. *Id.* at 83. The Court disagreed, noting that Congress's broad power over Indian affairs "has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment." *Id.* at 84.

Acknowledging Congress's unique powers over Indian affairs, the Court continued: "The question is therefore what judicial review of [the Act] is appropriate in light of the broad congressional power to prescribe the distribution of property of Indian Tribes." *Id.* at 85. In striking the balance between the clear and long-acknowledged constitutional powers over Indian affairs and the guarantee of equal protection, the Court applied the Indian rational basis standard of review. The Court upheld the statute, holding that "the legislative judgment should not be disturbed '(a)s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians.'" *Id.*

Recognizing that multiple facets of Indian identity have always existed simultaneously, the Indian rational basis standard of review does not rely on a simplistic and rigid distinction between classifications involving Indian ancestry on the one hand and purely non-ancestral criteria on the other hand. Such a test would impose on courts the impossible task of parsing and scrutinizing the basis of Indian identity in each case, as the Guardian and Petition-

ers ask this Court to do. Indeed, any legislative classification directed at citizens of federally recognized Tribes is almost certain to involve *some* component of Indian ancestry, simply because citizens of Indian Tribes are Indian and have an Indian identity. *Rice*, 528 U.S. at 519-20. That is hardly a novel observation on the Petitioners' part – but that overlap is a result of historical circumstance and has never been considered a bar to Congressional action.[8] *Id.* Because Congress is constitutionally empowered to legislate with respect to Indians specifically, whether or not a classification involves individuals of common Indian ancestry is not the relevant inquiry. Instead, the question is whether or not Congress directs the use of that Indian classification toward a permissible end. *Id.*

Accordingly, the Indian rational basis standard of review recognizes that where legislation is related to Congress's unique obligations to Indians, it is necessarily "reasonably and directly related to a legitimate, *nonracially based* goal," even though the classi-

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[8] Petitioners, and several *amici* in support of the Petitioners, attempt to draw the opposite conclusion from *Rice*, citing the majority opinion's observation that "Ancestry can be a proxy for race." *See, e.g.*, Pet. Br. at 46; Br. of Amicus Curiae Christian Alliance for Indian Child Welfare at 15-16; Br. of Amicus Curiae National Council for Adoption at 9. But *Rice* broadly affirmed Congress's powers to "single out [Indians] for special treatment[,]" 528 U.S. at 519, and clearly distinguished such treatment from classifications with "express racial purpose and ... effects." *Id.* at 517. Even if ancestry could be a proxy for race in other circumstances, *Rice* affirms that equal protection is not violated where, as here, the classification is made in furtherance of a nonracially based goal and is undertaken as an exercise of Congress's constitutional powers in matters involving Indian Tribes.

fication may also overlap with race. *Mancari*, 417 U.S. at 554 (emphasis added). *See also*, *id.* (noting that "This is the characteristic that generally is absent from proscribed forms of racial discrimination."). On the other hand, where legislation cannot be shown to be rationally related to Congress's obligations to Indians, it is subject to the same constitutional constraints as any racial classification because the historical, political, and constitutional justifications for treating Indians differently from other groups would not be available.[9]

II. Because the application of ICWA by the South Carolina courts was based on the protection of tribal citizenship, not race, it met the Indian rational basis standard and fell within the core Congressional powers acknowledged even by the Petitioners and the Guardian.

In attempting to make this case one about race, the Petitioners ignore the fact that ICWA can only be applied in the first instance on the basis of a child's membership or eligibility for membership in a federally recognized Tribe. 25 U.S.C. § 1903(4). "Membership" in a Tribe, which is more appropriately called citizenship, is at its core a matter of political status. This is a consequence of the political nature of Tribes

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[9] For example, this Court has suggested that Congress could not authorize a state to adopt an Indian preference that precludes non-Indians from voting in state elections on matters of "critical state affairs," such as the election of state officials. *Rice*, 528 U.S. at 522. Because the election of state officials relates to the administration of critical state-wide affairs rather than any unique obligation toward Indians, it likely would not pass constitutional muster under the Indian rational basis standard of review.

themselves and the governmental functions they perform, which distinguishes them from ethnic groups or associations which do not perform such functions. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

The inherent right of a Tribe to determine its own citizenship is at the core of what it means to be a self-governing Indian Tribe under familiar principles of federal Indian law. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978). "Although physically within the territory of the United States ... [Tribes] nonetheless remain a separate people, with the power of regulating their internal and social relations" including membership. *Wheeler*, 435 U.S. at 322; *id.* at 322 n.18. This Court in *Santa Clara Pueblo* agreed with a district court decision noting that "membership rules were 'no more or less than a mechanism of social . . . self-definition,' and as such were basic to the Tribe's survival as a cultural and economic entity." *Santa Clara Pueblo*, 436 U.S. at 53-54. The Court also noted that "[t]o abrogate tribal decisions, particularly in the delicate area of membership... is to destroy cultural identity[.]" *Id.*

If Tribes are to continue to function as self-governing entities, their ability to enroll and meaningfully incorporate new citizens into their nation must be protected. *See Foley v. Connelie*, 435 U.S. 291, 295-96 (1978) ("The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others.") (citing *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)). A Tribe's interest in enrolling eligible citizens (and the child's own interest in enrollment) is therefore critical and exists regardless of any ties the

custodial parent may or may not have with the Tribe. Congress has a strong constitutional basis for acting to preserve these tribal and individual rights under its broad Indian affairs powers. *Santa Clara Pueblo*, 436 U.S. at 62-63 (1978) (Congress's powers over Indian affairs include the powers to preserve as well as to limit or modify the powers of tribal self-government).

Both on its face and as applied in this case, ICWA operates to discourage the placement of Indian children in environments where their potential for tribal citizenship and participation in tribal life is not likely to be realized. ICWA is triggered on the basis of tribal citizenship or eligibility for tribal citizenship, and has the specific purpose and effect of protecting that citizenship. It is therefore evident that ICWA facially and as applied meets the Indian rational basis standard of review because it is tied to Congress's unique obligations toward Indian Tribes. ICWA also clearly falls within Congress's constitutional authority "to further Indian self-government" specifically acknowledged by the Guardian and Petitioners themselves. Pet. Br. at 46; GAL Br. at 54.[10]

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[10] For the same reasons, the application of ICWA in this case does not, as the Petitioners claim, conflict with federalism principles. Pet. Br. at 49. The federal justification is remarkably strong and firmly rooted in a power specifically reserved to Congress. *Lara*, 541 U.S. at 200 ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian Tribes, powers that we have consistently described as 'plenary and exclusive.'"). Just as Congress can claim broad constitutional powers over Indian affairs, the states can claim none, as they "have been divested of virtually all authority over Indian commerce and Indian Tribes." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996). Thus, federalism principles and

Petitioners assert that where a Tribe "recognizes as members all persons who are biologically descended from historic tribal members," then "the ancestry underpinning membership is 'a proxy for race.'"[11] Pet. Br. at 45-46. They acknowledge that "[t]his Court has upheld preferential treatment for Indians where the differentiation is a consequence of Indians' unique sovereign status." Pet. Br. at 44. Yet their argument would necessarily reduce that "unique sovereign status" to a nullity by treating tribal citizenship as nothing more than identification as part of a racial group, with no independent political meaning. That conclusion would fly in the face of two hundred years of legal precedent to the contrary and cannot be seriously entertained.

In short, tribal citizenship has always been recognized as a political matter. ICWA was triggered in this case by Father's tribal citizenship and Baby Girl's eligibility for citizenship in the Cherokee Nation. It was therefore not applied on the basis of race but on Father's and Baby Girl's political status and falls comfortably within the core of tribal self-government interests that Congress may constitutionally protect.

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the Tenth Amendment do not operate to restrict Congressional action taken under its Indian affairs powers. *Id.*

[11] As has been noted, Petitioners improperly rely on *Rice v. Cayetano* for this claim. *See* note 8, *supra*, and accompanying text.

III. The restrictive threshold tests advanced by the Petitioners and Guardian to avoid the proper standard of review are not supported by law.

Petitioners and the Guardian apparently recognize that their constitutional claims involve a departure from the long established Indian rational basis standard applied in *Weeks*, *supra*. In order to lay the foundation for their constitutional claims, then, they seek to limit the scope of the standard by proposing new threshold tests for its applicability. Under the Guardian's formulation, Congress's actions under its constitutional Indian affairs powers would be subject to strict scrutiny unless the legislation enacted "relates to Indian land, tribal status, self-government, or culture." GAL Br. at 54. Petitioners advance a similar approach when they argue that the result in this case was "unmoored to any legitimate federal interest in protecting existing tribal ties, culture, or self-government" and is therefore subject to strict scrutiny. Pet. Br. at 3, 45-46.

These threshold tests are contrary to this Court's precedents and have no basis in logic or law. As was made clear in *United States v. Antelope*, the application of the Indian rational basis standard of review is not predicated on a court's independent determination that the classification relates to tribal self-government, culture, land, or any other threshold criteria. In *Antelope*, the Court concluded:

> [*Mancari* and *Fisher*] involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal conduct within Indian country implicating

> Indian interests. But the principles reaffirmed in *Mancari* and *Fisher* point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian Tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "'racial' group consisting of 'Indians'[.]"

Antelope, 430 U.S. at 646-647.

Whether or not a classification furthers self-government or protects tribal culture may be relevant to whether or not it meets the Indian rational basis standard, but it is not an independent prerequisite to the application of that standard or the only means of satisfying it. *Compare Mancari*, 417 U.S. at 554 (finding that a BIA employment preference met the test because it was "reasonably designed to further the cause of Indian self-government and make the BIA more responsive") *with Weeks*, 430 U.S. at 85 (finding that a distribution of judgment funds to certain Indians but not others satisfied the standard of review, not because it furthered self-government, but because "[a]s tribal property, the appropriated funds were subject to the exercise by Congress of its traditional broad authority over management of lands and property held by recognized Tribes[.]").

Similarly, whether or not legislation deals directly with tribal land may sometimes be relevant to whether it is rationally related to Congress's unique obligations toward Indians, but it is not a required

element of any test for constitutional authority.[12] Congress's power over Indian affairs does not spring from its power over Indian lands, but from its constitutional powers over Indians and Indian Tribes and the fundamentally political nature of the relationship between the United States and Indian Tribes. *United States v. Holliday*, 70 U.S. 407, 418 (1865) (Congress has constitutional authority to regulate intercourse between Indians and non-Indians outside of Indian Country as "The right to exercise [such power] in reference to any Indian Tribe, or any person who is a member of such Tribe, is absolute, without reference to the locality of the traffic, or the locality of the Tribe, or of the member of the Tribe with whom it is carried on.").

In *Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194-95 (1876), the Court noted that "this court has held that the power to regulate commerce with the Indian Tribes was, in its nature, general, and not confined to any locality; that its existence necessarily implied the right to exercise it, whenever there was a subject to act upon[,]" and that such authority is "[b]ased ... exclusively on the Federal authority over the subject-matter[.]"). *See also Antoine v. Washington*, 420 U.S. 194, 204 (1975) (legislation ratifying a treaty that reserved special off-reservation hunting and fishing rights for tribal members was a proper exercise by Congress of its broad power under the Constitution to "[single] out Indians as a proper subject for separate legislation.") (citing *Mancari*).

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[12] For a more thorough discussion of why land ownership is not a determinative factor when evaluating Congress' constitutional power over Indians, *see* Br. of Amicus Curiae Tanana Chiefs *et al*.

The absence of any threshold requirement to the application of the Indian rational basis standard of review in over 200 years of Supreme Court precedent is perhaps why the Guardian cites only a single Ninth Circuit case, *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), for the notion that such a "key" test exists. Specifically, the Guardian reads *Williams* as requiring that challenged legislation involving special treatment for Indians "[relate] to Indian land, tribal status, self-government or culture." GAL Br. at 54. But the *Williams* passage quoted by the Guardian served only to list, by way of example, legislation that "passes *Mancari*'s rational relation test because 'such regulation is rooted in the unique status of Indians as a separate people with their own political institutions.'" *Id.* at 664. In fact, neither the *Williams* court nor any other court has held that legislation *must* fit into one of the four categories listed by the Guardian or that these categories alone provide "[t]he key to whether legislation involving Indians triggers the relaxed review of *Mancari*, or the exacting scrutiny traditionally demanded of classifications based on race[.]" GAL Br. at 54.

Notably, the *Williams* court cited *Antelope* for the scope of the Indian rational basis standard of review. *Williams*, 115 F.3d at 665. As discussed, the Court in *Antelope* specifically held that legislation need not be tied to matters of self-government to meet the standard. *Id.* at 646-647. It further found that the Major Crimes Act as applied in that case very easily passed constitutional muster because the Indian defendants to whom it was applied were *tribal members*. *Antelope*, 430 U.S. at 646. The chain of logic advanced by the Guardian, then – that the *Williams* court's examples of legislation proper under *Mancari* and *Antelope* somehow created a rigid threshold test

that ICWA cannot satisfy – finds no support in any legal precedent.[13]

IV. The threshold tests proposed by the Guardian and the Petitioners are fatally subjective and would force courts into a policymaking role properly reserved for Congress.

As noted, the Guardian's argument would require all federal legislation providing special treatment for Indians to "relate to Indian land, tribal status, self-government or culture" in order to avoid strict scrutiny. GAL Br. at 54. It is difficult to decipher exactly what the terms "self-government" and "culture" are meant to encompass under this test. All that can be gleaned from the Guardian's brief is that this threshold test would not be satisfied by any of the interests implicated here, including: the Tribe's self-government interest in enrolling and maintaining its citizens as future participants in the political and cultural life of the Tribe; the child's interests in the rights and opportunities that flow from tribal citizenship and civic participation; the child's interest in understanding her cultural and political heritage; and the federal government's interest in protecting

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[13] To the extent that *Williams* may have suggested a narrower reading of *Antelope* through the use of a "unique tribal interests" test, relying on factors such as "Indian culture" and whether or not the legislation furthers a "native way of life" as determined by the court, it has been criticized for departing from the governing precedents and relying on inappropriate, subjective criteria. *E.g.* Carole Goldberg, *Descent into Race*, 49 UCLA L. Rev. 1373, 1376-1380 (2002). Whatever standard is employed by the courts, Indian Tribes should not be subject to the divestment of critical legal protections conferred on them by the Constitution simply because tribal cultures, like all cultures, grow and evolve in reaction to new circumstances. *Id.* at 1380.

citizenship and family relationships in tribal nations and communities.

The Petitioners' threshold test for the Indian rational basis standard of review also ignores these interests and is even less defined than the Guardian's test. Petitioners simply assert that the result in this case was "based on race, unmoored to any legitimate federal interest in protecting existing tribal ties, culture, or self-government." Pet. Br. at 3. That assertion is repeatedly made throughout Petitioner's brief without any explanation as to why it might be so.[14]

If adopted, this threshold test in practice would require courts to make sensitive and far reaching policy decisions of the kind specifically reserved for Congress. They would invite the erosion of basic legal protections for Indians and Indian Tribes extended under the Constitution by imposing vague and subjective cultural criteria to be applied by the courts. Application of the Guardian's undefined "Indian land, tribal status, self-government or culture" test would require courts to determine (on an unknown basis) what comprises a native "way of life" and what constitutes the meaningful exercise of culture and self-governance within the unique context of that way of life. These determinations have been left to Congress and the Tribes over the course of our Nation's history not only due to the expansive power over Indian affairs specifically reserved to Congress under the Constitution, but also because of the properly limited role of the courts in our democratic system. Congress, in turn, has most often

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[14] By our count, the Petitioners repeat this claim or some variation of it over 15 times in their brief, while the Guardian does so over 25 times.

appropriately chosen to leave such cultural and other sensitive determinations to Tribes by deferring to their right to determine their own citizens.

While a few courts have attempted to implement the kind of cultural litmus tests suggested by Petitioners and the Guardian,[15] most have sensibly rejected them as simply inappropriate. As noted by one California court of appeal:

> The determination whether an Indian child and/or his or her parents have any "significant" ties to Indian culture is, by its very nature, a highly subjective one that state courts are ill-equipped to make [...] [Under that approach] the trial court was left to decide, without any guidance or expertise, if the parents' Indian activities and beliefs were "significant" enough to warrant application of ICWA. No evidence was presented describing Indian cultural practices generally, or explaining how the family's "Indianness" might be expected to manifest itself day to day.

In re Alicia S., 65 Cal. App. 4th 79, 90-91 (Cal. 1998). *See also, e.g.*, *In re N.B.*, 199 P.3d 16, 22 (Colo. Ct. App. 2007) ("Applying [this type of analysis] would

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[15] For example, *In re Bridget R.*, 41 Cal. App. 4th 1483, 1514-15 (1996), a state court attempting to determine "Indianness" in an effort to ensure that ICWA was not applied on the basis of race alone resorted to such criteria as whether an Indian child's parents "privately identified themselves as Indians and privately observed tribal customs... took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, ... or maintained social contacts with other members of the Tribe" among other things. *See also*, *In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Cal. Ct. App. 2001) (relying on *Bridget R.* and employing a similar analysis).

result in each state court using its own value system to decide whether a child is "Indian enough" for ICWA to apply, which would limit the Tribes' efforts to regain members who were lost because of earlier governmental action."); *In re Baby Boy C.*, 27 A.D.3d 34, 49 (NY 2005) (state courts are "ill-equipped" to "make the inherently subjective factual determination as to the 'Indianness' of a particular Indian child or parent" and such an exercise would be contrary to federal policy). These warnings and observations apply not only in the ICWA context or in state (as opposed to federal) court settings, but generally to any subjective, culturally specific test.[16] They likewise apply to the Guardian's test, which as formulated in the Guardian's brief would apply as a threshold matter to all federal Indian affairs legislation that becomes the subject of constitutional challenge.

V. The "Existing Indian Family" doctrine advanced by the Petitioners and the Guardian suffers from the same fatal flaws as their threshold tests for constitutionality.

The Petitioners and the Guardian also argue that ICWA specifically must be limited, as applied, by still another test in order to pass muster under their threshold tests for constitutionality: the "existing Indian family" doctrine. This "doctrine" is not found in any of the provisions of ICWA and suffers from the same defects as the other threshold tests discussed above.

The existing Indian family doctrine is a judicially created test used by a small number of state courts to

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[16] *See* note 13, *supra*.

limit the application of ICWA. By Petitioners' count, courts in seven states apply the doctrine, while the courts in fourteen states have specifically rejected it. Pet. at 11-12. The doctrine essentially provides that ICWA may not be applied in cases where "adoptive placement of the child would *not* cause the 'breakup of [an] Indian family.'" Pet. Br. at 40 (emphasis added). Under this test, a child's citizenship (or eligibility for citizenship) in a Tribe does not in itself create a sufficient connection between the child and the Tribe on which to constitutionally base the application of ICWA's protective provisions. Instead, the burden is on the party relying on ICWA to demonstrate to the satisfaction of the court that there are additional tribal ties to support the threshold determination that an existing Indian family would be adversely affected.

ICWA itself does not identify any specific tribal ties that must be proven to trigger application of the statute beyond eligibility for citizenship, so courts have developed differing formulations of the existing Indian family doctrine.[17] Under the Petitioners' formulation, "When an adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian mother with sole custodial rights [under state law], ICWA's purpose to prevent the unwarranted removal of Indian children and the continuation of their

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[17] *Compare In re Bridget R.*, 41 Cal. App. 4th 1483, 1514-15 (1996) (the existing Indian family doctrine requires that the child's biological parent or parents "maintain a significant social, cultural, or political relationship with their Tribe") *with In re N.J.*, 221 P.3d 1255, 1264 (Nev. 2009) ("The judicially created EIF doctrine is an exception to ICWA that precludes its application in cases where the court determines that there is no existing Native American family, meaning the child is not, and never was, part of a Native American family or Tribe.")

existing Indian ties is not implicated" and ICWA cannot be applied. Pet. Br. at 40 (citing *In re Adoption of T.R.M.*, 525 N.E.2d 298, 303 (Ind. 1988)). The Petitioners state variations on this theme throughout their brief, and they further claim that "The existing Indian family doctrine, by focusing on connections to tribal culture and sovereignty, prevents ICWA from devolving into a race-based preference for Native Americans" that could not meet constitutional requirements. Pet. at 26.

In a similar vein, the Guardian cites with approval *Adoption of T.R.M.*, *supra*, for the proposition that the "purpose of ICWA is to protect Indian children from improper removal from their existing Indian family units..." GAL Br. at 47. The Guardian, therefore, would require something "beyond biology" for ICWA to apply as a constitutional matter, though it is not clear what. GAL Br. at 48.

However formulated, the existing Indian family doctrine wrongly conflates tribal membership with race and discounts the independent political meaning of tribal citizenship as well as Congress's explicit constitutional powers to legislate with regard to Indians. It would open the door to vague judicial analyses seeking "some other tribal connection," left undefined, to ensure that the application of ICWA is not based on race. GAL Br. at 48. *See In re Bridget R.*, 41 Cal. App. 4th 1483, 1509 (1996). This is also inconsistent with Congress's authority to determine who shall be considered Indian for purposes of federal law, *United States v. Sandoval*, 231 U.S. 28, 47 (1913), authority that cannot be diminished even where a state court has decided that the Indians "have become fully assimilated into the political and

social life of the State[.]" *United States v. John*, 437 U.S. 634, 652 (1978).

Petitioners attempt to distinguish their version of the existing Indian family doctrine from the version employed in cases like *Bridget R.* by focusing on which parent has custody. Pet. Br. at 40-41. But they admit that when tribal citizenship is considered an insufficient basis for application of ICWA, custody is only relevant because "there is at least the possibility that the child could be exposed to Indian culture or tribal politics through her Indian parent." Pet. Br. at 45. Ultimately, then, the Petitioners' test – like the cultural litmus test employed in *Bridget R.* – follows from the faulty assumption that tribal membership is merely a proxy for race. For that reason, the Petitioners' argument necessarily demands some cultural or political showing of "Indianness" beyond eligibility for citizenship, such as a child's potential home life. That requirement is inconsistent with the role of the courts, with Congress's authority to determine who is an Indian for purposes of federal law, and with the Tribes' right to determine their own citizenship.

In that sense, the Petitioners' position cannot be meaningfully distinguished from the more explicitly cultural version of the "existing Indian family" doctrine in its premise, reasoning, and ultimate requirements. Indeed, "[t]he requirement that Indian people enact their Indianness to the satisfaction of outsiders—with the burden on the Indians themselves—is one of the consequences" of ignoring the political meaning of tribal citizenship and erroneously concluding that it is based on race. Goldberg, *supra* note 13, at 1388.

By protecting tribal citizenship ties through ICWA, Congress permissibly chose to allow Tribes them-

selves to determine the level of cultural and political participation required for tribal citizenship. Perhaps even more crucially, Congress acted to ensure Tribes the opportunity to reincorporate individuals eligible for tribal citizenship who may have been prevented from participating in tribal life for any number of reasons, including the downstream effects of assimilationist federal and state policies. *E.g.*, *In re N.B.*, *supra*, 199 P.3d at 22. This fundamental goal would be undermined by inappropriate judicial interference if the Petitioners' and the Guardians tests were to be adopted.

CONCLUSION

For the reasons stated, *amici* respectfully request that the decision of the Supreme Court of South Carolina be affirmed.

Respectfully submitted,

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March 27, 2013

APPENDIX

APPENDIX

LIST OF MEMBER TRIBES OF *AMICI* TRIBAL ORGANIZATIONS

All Indian Pueblo Council

Ohkay Owingeh, New Mexico

Pueblo of Acoma, New Mexico

Pueblo of Cochiti, New Mexico

Pueblo of Isleta, New Mexico

Pueblo of Jemez, New Mexico

Pueblo of Laguna, New Mexico

Pueblo of Nambe, New Mexico

Pueblo of Picuris, New Mexico

Pueblo of Pojoaque, New Mexico

Pueblo of San Felipe, New Mexico

Pueblo of San Ildefonso, New Mexico

Pueblo of Sandia, New Mexico

Pueblo of Santa Ana, New Mexico

Pueblo of Santa Clara, New Mexico

Pueblo of Santo Domingo, New Mexico

Pueblo of Taos, New Mexico

Pueblo of Tesuque, New Mexico

Pueblo of Zia, New Mexico

Pueblo of Zuni, New Mexico

Ysleta del Sur Pueblo, Texas

Maniilaq Association

Native Village of Ambler

Native Village of Buckland

Native Village of Kiana

Native Village of Kivalina

Native Village of Kobuk

Native Village of Kotzebue

Native Village of Noatak

Noorvik Native Community

Native Village of Point Hope

Native Village of Selawik

Native Village of Shungnak

United South and Eastern Tribes, Inc.

Alabama-Coushatta Tribe of Texas

Aroostook Band of Micmacs, Maine

Catawba Indian Nation, South Carolina

Cayuga Nation, New York

Chitimacha Tribe of Louisiana

Coushatta Tribe of Louisiana

Eastern Band of Cherokee Indians, North Carolina

Houlton Band of Maliseet Indians, Maine

Jena Band of Choctaw Indians, Louisiana

Mashantucket Pequot Tribal Nation, Connecticut

Mashpee Wampanoag Tribe, Massachusetts

Miccosukee Tribe of Indians of Florida

Mississippi Band of Choctaw Indians

Narragansett Indian Tribe, Rhode Island

Oneida Indian Nation, New York

Passamaquoddy Tribe—Indian Township, Maine

Passamaquoddy Tribe—Pleasant Point, Maine

Penobscot Indian Nation, Maine

Poarch Band of Creek Indians, Alabama

Saint Regis Mohawk Tribe, New York

Seminole Tribe of Florida

Seneca Nation of Indians, New York

Shinnecock Indian Nation, New York

The Mohegan Tribe, Connecticut

Tunica-Biloxi Tribe of Louisiana

Wampanoag Tribe of Gay Head (Aquinnah), Massachusetts

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS FOR PETITIONER

Supreme Court, U.S.
FILED
MAR 28 2013
OFFICE OF THE CLERK

No. 12-399

In the

Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR UNDER THE AGE OF FOURTEEN YEARS, BIRTH FATHER, AND THE CHEROKEE NATION,

Respondents.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF 63 CALIFORNIA INDIAN TRIBES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS BIRTH FATHER AND THE CHEROKEE NATION

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QUESTION PRESENTED

1. Whether the unique circumstances of Indians in California, and the state's numerous efforts to protect Indian children and tribes based primarily on the Indian Child Welfare Act ("ICWA"; 25 U.S.C. §§ 1901 *et seq.*), will be adversely affected by any limitation imposed on the ICWA's application by this Court.

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Tina Norris, Paula L. Vines, and Elizabeth M. Hoeffel, U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010 (C2010BR-10)*, Table 2 (January 2012), http://tinyurl.com/7h6apt8 1

STATEMENT OF INTEREST AND SUMMARY OF ARGUMENT

Of the 566 federally-recognized Indian tribes in the United States, 110 are located in California. 77 Fed. Reg. 47,868 (Aug. 10, 2012). The 2010 Census places the total Indian population of California at approximately 723,000 persons, more than any other state. Tina Norris, Paula L. Vines, and Elizabeth M. Hoeffel, U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010 (C2010BR-10)*, Table 2 (January 2012), available at http://tinyurl.com/7h6apt8. Thus, tens of thousands of Indians who are members and citizens of other tribes reside here in California. *Amici* are 63 federally-recognized tribes and five Indian organizations who represent a broad cross-section of the Indian population in California.[1]

Indians in California have a unique history resulting from both federal and state actions, the effects of which have been largely adverse to tribal interests. From the termination era to the continuum of assimilation policies, the most common historical theme was an attempt to exterminate Indians, Indian tribes, and tribal culture. This history is relevant to the questions presented to the Court.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief through letters of consent on file with the Clerk of this Court. A full list of *amici* is appended to this brief.

The loss of Indian children to non-Indian families in California dates back to the 1850s. At that time, California governors authorized the state militia to carry out "[e]xpeditions against the Indians" on numerous occasions. *See* Kimberly Johnston-Dodds, *Early California Laws and Policies Related to California Indians* 15-16 (California State Library, California Research Bureau 2002), available at http://tinyurl.com/d2xgw6z. The impact of these state-sanctioned killings on Indian families was devastating, leaving many children without parents. Also at that time, California enacted laws which authorized any person to go before a Justice of the Peace to seek custody of an Indian child for indentured servitude until as late as age 30 for males and 25 for females. These early "Indian child welfare" laws led to a documented history of kidnapping and sale of Indian children during the 1850s and 1860s, which continued even after the laws were later repealed. *Id.* at 5, 8-12.

Amici have worked for many years with the California Legislature to ameliorate this dark history and to ensure protections for Indian children, families, and tribes. Following the enactment of the ICWA in 1978, the state cultivated numerous collaborative efforts with the *amici,* seeking consensus among state officials, local agencies, and tribal governments.

As a result, California enacted legislation and statewide rules of court which strike an appropriate balance between the interests of the United States, the interests of the state, and the interests of Indian

tribes in matters of Indian child welfare. The ongoing collaborative endeavors between the state and *amici* are all working toward the same end – ensuring that the terms of the ICWA are implemented to fulfill its stated purposes, goals, and spirit.

Any decision by this Court which narrows the scope of the ICWA could unravel decades of hard work by the state and the *amici*. Likewise, any decision by this Court which limits the application of the ICWA may have negative repercussions to the entire child welfare system, such as dependency cases and guardianships where family preservation benefits from tribal intervention in certain cases.

ARGUMENT

I. The History of the Treatment of California Tribes is Relevant to the Purpose and Implementation of the ICWA.

"That a war of extermination will continue to be waged between the races, until the [California] Indian race becomes extinct, must be expected. While we cannot anticipate this result but with painful regret, the inevitable destiny of the [Indian] race is beyond the power or wisdom of man to avert." Peter H. Burnett, *Governor's Annual Message to the Legislature, January 7, 1851, in Journals of the Senate and Assembly of the State of California, at the Second Session of the Legislature,* 1851-1852 15 (San Francisco: G.K. Fitch & Co., and V.E. Geiger & Co., State Printers, 1852), *cited in* Johnston-Dodds, *supra,* at 15.

For California tribes, the "war of extermination" has been an ongoing threat since the first wagons arrived from the east. Early extermination efforts in-

cluded not only killing Indians, but also stripping them of their lands. Between 1851 and 1852, the United States entered into 18 treaties with 139 California signatories in order to secure land for reservations. Advisory Council on California Indian Policy, *Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416: The ACCIP Historical Overview Report: The Special Circumstances of California Indians* 5 (September 1997) ("Historical Report").[2] However, those treaties were never ratified by Congress, due to pressure from the California delegation to protect gold mining prospects at the time. Bruce S. Flushman and Joe Barbieri, *Aboriginal Title: The Special Case of California,* 17 Pac. L. J. 391, 403-406 (1986). In an extraordinary step, the Senate had the treaties placed under secret seal. *Historical Report* at 6. Most importantly, tribes were not informed that the treaties had not been ratified. *Id.*

1851 also saw passage of the California Land Claims Act. 31 Cong. Ch. 41, March 3, 1851, 9 Stat. 631 (1851). Under that law, if a person failed to file a claim to their land within the law's two-year window, the land would then revert to the public domain. *Id.* at 633. Most California Indians did not file a claim, since they believed their lands were already secured by treaty. It is estimated that tribes lost approximately 700,000 acres of their aboriginal lands, quickly finding themselves landless and thus homeless. Flushman, *supra*, at 403.

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[2] *The ACCIP Historical Overview Report* is not listed in the Table of Contents of the *Final Report* as its own report, but can be found immediately following the *Executive Summary.*

In 1905 the California treaties were unsealed and made public for the first time. *Historical Report* at 6. Congress passed legislation to acquire small tracts of land for the homeless Indians of California; several subsequent appropriations provided funding for the purchase of parcels in the central and northern parts of the state. *Id.* at 7. These acquisitions resulted in what is commonly termed the "rancheria system" in California. *Executive Summary* at 5. However, rancherias were generally too small and too remote to support a tribal population.[3]

Beginning in 1944, federal Indian policy again shifted to one seeking termination of tribes and an end to federal oversight of tribal lands and resources. A result was the Rancheria Act of 1958, which identified 41 California rancherias for termination. Act of August 18, 1958, Pub. L. No. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, Pub. L. No. 88-419, 78 Stat. 390. Under that law, tribal lands were divided among individual tribal members, and the federal government was required to ensure that certain services (such as water, sanitation, and housing) would be provided to the individual Indians. These government services were either never provided or were inadequate, rendering much of the now individually-owned lands uninhabitable. *Executive Summary* at 4. Many subsequently lost their land through tax sales or sales under duress in an effort to meet basic living needs. *Id.*

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[3] *See* Edward Castillo, *The Impact of Euro-American Exploration and Settlement, in Handbook of North American Indians*, Vol. 8 110-113 (Robert F. Heizer, ed., University of California Press 1976). Most rancherias today remain unable to support all tribal members due to size and resources.

This situation persisted into the late 1960s, when California tribes filed suit against the United States seeking to "un-terminate" their reservations. *Id.* Dozens have since been restored by judicial decision, settlement, or acts of Congress. *Id.*

While California tribes have struggled for recognition, protection, land, and basic living necessities, there was one piece of legislation passed in 1978 which reversed the momentum of termination and renewed their spirit: the ICWA. It brought a promise that tribal members would not be deprived of their children, and that their children would remain in the tribal community, thus protecting the future of the tribe. This promise is being called into question in the case now before the Court.

II. Altering the Scope of the ICWA Will Upset Settled California Law.

Application of the ICWA is a significant thread in California law. The state Legislature took action on three separate occasions to reject an artificial limitation on the ICWA's application, to build upon and enhance the basic protections afforded by the ICWA, and, most recently, to expand dependency law by recognizing "tribal customary adoption" as a permanent plan.

A. California Rejected the "Existing Indian Family" Exception.

1. The Legislature Passed Two Laws Opposing the Exception.

Some jurisdictions recognize an "existing Indian family" exception to the ICWA. This judicially-

created exception is based on one of two premises: either 1) that in order for the ICWA to be constitutional, it can only apply where either a parent or child resides or is domiciled on the reservation, or maintains a social, cultural or political relationship with a tribe; or, 2) that Congress intended the ICWA only to protect familial and tribal relationships in a pre-existing Indian home. *In re Bridget R.*, 41 Cal. App. 4th 1483 (1996); *In re Suzanna L.*, 104 Cal. App. 4th 223 (2002).

In 1996, a few California appellate courts began to recognize the exception. Others rejected it, finding that the plain language of the ICWA provides no such limitation, and that the exception frustrates the intent of the ICWA.[4]

The Legislature responded with Assembly Bill 65 ("AB 65") in 1999. Assemb. B. 65, 1999-2000 Reg. Sess. (Cal. 1999). AB 65 repudiated the exception by providing that when a tribe determines a child to be a member or eligible for membership, that relationship "shall constitute a significant political affiliation with the tribe and shall require the application of the [ICWA]." Cal. Welf. & Inst. Code § 360.6 (renumbered by Sen. B. 678, 2005-2006 Reg. Sess; 2006 Cal. Stats. Ch. 828 (Cal. 2006) to Cal. Welf. & Inst. Code § 224).

Despite AB 65, the exception continued to be applied in some California decisions. *In re Santos Y.*, 92

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[4] The Second, Fourth, and Sixth Districts all recognized the exception at some point, while the First, Third, and Fifth Districts all rejected it. The Sixth District later changed its position and rejected the exception as well. *In re Vincent M.*, 150 Cal. App. 4th 1247 (2007).

Cal. App. 4th 1274 (2001). As a consequence, in 2006 the Legislature reiterated its repudiation of the exception with Senate Bill 678 ("SB 678"). Sen. B. 678, 2005-2006 Reg. Sess; 2006 Cal. Stats. Ch. 828 (Cal. 2006). SB 678 added to the language of AB 65 to specifically provide that:

> "It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled." Cal. Welf. & Inst. Code § 224(a)(2); emphasis added.

> "A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the [ICWA] to the proceedings." Cal. Welf. & Inst. Code § 224(e); emphasis added.

The only cases which have referenced the exception since SB 678 have rejected it. *In re Adoption of Hannah S.*, 142 Cal. App. 4th 988 (2006); *In re Vincent M.*, 150 Cal. App. 4th 1247 (2007). Allowing a state court to determine who is or is not "enough" of

an Indian to trigger application of the ICWA is inconsistent with federal and California policy.

2. The Exception Does Not Account for California's Unique History.

Even without the Legislature's pronouncements, the exception is inappropriate for California. While many Indians in California are members of or belong to a California tribe, there is also a significant population of Indians from non-California tribes, many of whom the federal government moved to California under the Indian Relocation Program. Act of August 3, 1956, 84 Cong. Ch. 930, Pub. L. No. 959, 70 Stat. 986 (1956). Both California and non-California Indians are involved in "child custody proceedings" as defined under the ICWA.

While many tribal members can and do maintain a political, social, and cultural relationship with their tribe, distance adds an obstacle. Members of both California tribes and out-of-state tribes face difficulties participating in activities on their reservations. For out-of-state tribal members, geography compounds the barrier to such participation. The same is true for members of California tribes. As noted above, in the 1850s most California tribes suddenly found themselves homeless due to the combined effect of secretly unratified treaties and the Land Claims Act. As a result, most California Indians were forced to live far from their lands, finding themselves in a similar situation to those hailing from out-of-state tribes.

Some federally-recognized tribes in California lack a formal land base, reservation or rancheria, while others only recently acquired tribal lands.[5]

Individual Indians who as a practical matter are unable to live on their reservation, or take part in on-reservation life, are no less "Indian" than tribal members who are able to do so. A person's political status as a tribal member is a determination left solely to the tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The ICWA in large part is intended to protect that status. It is not appropriate for a state agency or court to create its own artificial requirements for that status.[6]

B. California Enhanced the Protection of Indian Children with Legislation that Relies on the ICWA as a Foundation.

1. California Enacted SB 678 to Affirm the State's Commitment to Preserving Indian Families and the Tribe's Role in Child Custody Cases.

As noted above, SB 678 included a statutory rejection of the existing Indian family exception. The bill was much broader than that, however. It represents the most comprehensive ICWA-related legislation adopted in any state before or since. SB 678

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[5] In 2012, the California Board of Equalization amended its regulations to provide an exemption from sales and use tax for off-reservation purchases by tribes who are landless. Cal. Code Regs., tit. 18, § 1616.

[6] Furthermore, detriment to the child is likely to result from the delay caused by a mini-trial on whether an individual is Indian "enough" to apply the ICWA.

codified the ICWA's requirements into state law, specifically declaring that an Indian child's best interests are served by protecting and encouraging a connection to his or her tribal community. Cal. Welf & Inst. Code § 224(a)(2).

In addition, SB 678 built upon the ICWA's foundation by creating further safeguards in child custody proceedings. These enhancements include:

(1) Clarifying that the ICWA applies to probate guardianships and conservatorships (Cal. Prob. Code § 1459.5);[7]

(2) Imposing an ongoing and affirmative duty to inquire whether a child in a child custody proceeding may be an Indian child (Cal. Welf. & Inst. Code § 224.3(a));

(3) Requiring documentation of the active efforts made to place an Indian child within the ICWA's order of preference (Cal. Welf. & Inst. Code § 361.31(k));

(4) If no preferred placement is available, requiring active efforts to place an Indian child "with a family committed to enabling the child to have extended family visitation and participation in the cultural and cere-

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[7] Prior to SB 678, a question existed whether a non-social services petitioner could circumvent the ICWA by filing for guardianship or conservatorship letters for an Indian child while not following state or federal law requiring active efforts be made to prevent the breakup of the family.

monial events of the child's tribe" (Cal. Welf. & Inst. Code § 361.31(i));

(5) Requiring expert witness testimony to be live, rather than by declaration, unless all parties agree otherwise (Cal. Welf. & Inst. Code § 224.6(e));

(6) Prohibiting the party seeking foster care placement or termination of parental rights from using its own employee as the required expert witness (Cal. Welf. & Inst. Code § 224.6(a));

(7) Providing that waiting until reunification services have been terminated before requesting a transfer to tribal court does not constitute good cause to deny such a request (Cal. Welf. & Inst. Code § 305.5(c)(2)(B));

(8) Requiring that available tribal resources be used when making active efforts to keep the Indian family intact (Cal. Welf. & Inst. Code § 361.7(b));

(9) Requiring that available tribal resources be used when trying to meet the ICWA's placement preferences (Cal. Welf. & Inst. Code § 361.31(g));

(10) Acknowledging that the Interstate Compact on the Placement of Children does not apply to any placement sending or bringing an Indian child into another state pursuant to a

transfer to tribal court under 25 U.S.C. § 1911 (Cal. Fam. Code § 7907.3); and,

(11) Applying sanctions of $10,000 for the first offense and $20,000 for the second if a person knowingly and willfully falsifies or conceals a material fact concerning whether a child is an Indian child or the parent is an Indian. Cal. Fam. Code § 8620(g) and *see also* Cal. Welf. & Inst. Code § 224.2(e).

In sum, SB 678 made clear that the ICWA is an integral part of maintaining a child's political, social, and cultural connections to his or her tribe.

2. California Recognizes "Tribal Customary Adoption" as a Culturally-Appropriate Permanent Plan.

Termination of parental rights is anathema to many Indian tribes. The idea that a biological and spiritual bond can be severed simply by a court order is unfathomable. In addition, termination of parental rights may interfere with an Indian child's rights to tribal membership and the benefits that flow therefrom.[8] Assemb. Floor Analysis, Conc. in Sen. Amends. to Assemb. B. 1325, 2009-2010 Reg. Sess.; 2009 Cal. Stats, ch. 287, as amended Sept. 2, 2009, at 3. It may also prevent him or her from inheriting

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[8] Such rights may include use of tribal lands, per capita payments, health care and educational benefits, hunting and fishing rights, gathering rights, inheritance of regalia and ceremonial items, and eligibility for scholarships or employment training programs.

trust property from biological parents or relatives. 25 U.S.C. § 2206(j)(2)(B)(iii).

In recognition of the above, California enacted legislation to include "tribal customary adoption" ("TCA") as a concurrent permanent plan along with adoption, guardianship, and foster care. Cal. Welf. & Inst. Code § 366.24. TCA allows an Indian child to be adopted without terminating parental rights. If TCA is identified as appropriate for a particular child, the state court receives a tribal customary adoption order from a tribe or tribal court, and affords that order full faith and credit. The order addresses such issues as the child's inheritance rights and legal status with the tribe; it may also include provisions to ensure the child's participation in tribal events, and the contact, if any, which the child will have with extended family. *Id.*

The TCA process allows for the permanency of adoption without the harms of severing the parent-child relationship. By affording an alternative to the contentious process of terminating parental rights, TCA can decrease contested issues and trials, thereby conserving scarce judicial resources.[9]

Although these legislative enactments have been enormously beneficial to Indian children, families, and tribes, it would be misleading to say that there is

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[9] TCA has only been an available permanency option since July 2010, but the initial data suggests an appreciably shorter time period is required to finalize a TCA as compared to a standard adoption. Administrative Office of the Courts, *Judicial Branch Report to the Legislature: Tribal Customary Adoption* (Jan. 2013), available at http://tinyurl.com/c8j7g5k.

no longer any political or racial bias in our courts and child welfare systems. To the contrary, even with these successes, Indian children, families, and both California and non-California tribes rely upon and trust in the ICWA to continue to fulfill the Congressional promises articulated in 1978 and expanded in California.

III. California Tribes and Counties Are Involved in Numerous Collaborative Efforts to Better Implement the ICWA.

California and many of its counties are involved in a number of collaborative projects with California tribes and tribal consortia. These projects illustrate some of the extent to which the state and tribes work cooperatively under current law.

Multiple counties have entered into memorandums of understanding ("MOU") with local tribes, setting forth appropriate methods for implementing the ICWA on a local level. Other counties have adopted protocols on the same subject in consultation with local tribes. This is particularly true in counties with large numbers of tribes: Humboldt, Lake, Mendocino, Riverside, and Sonoma counties all have developed such MOUs or protocols, and Alpine County is working towards the same.

Even more common are monthly or quarterly roundtables – meetings between tribal representatives, county child welfare staff, county attorneys, judges, educators, Indian and non-Indian service providers, and others to discuss issues involving the ICWA's implementation, Indian children and families, and services. Often these roundtables are the primary forums in which ICWA-related policies and

programs are developed and reviewed for effectiveness.

In 2010, state and tribal court judges formed the Tribal Court/State Court Forum in order to create a means of discussing cross-jurisdictional issues such as enforcing court orders, determining jurisdiction, and sharing services. http://tinyurl.com/d8rr5gn. With regard to the ICWA, the Forum's work addresses the manner in which information pertaining to child welfare cases and referrals is shared between counties and tribes. Eleven tribal court judges and fifteen state court judges currently sit on the Forum, along with representatives from the offices of the California Governor and Attorney General.

The California Administrative Office of the Courts ("AOC") established a Tribal/State Programs Unit, whose purpose is to serve as a liaison and assist the judiciary in policy and program development to ensure justice and quality judicial service for California tribes, Indian communities, and Indian children and families. The Unit focuses on Indian child welfare cases, domestic violence, sexual assault and stalking, provides community outreach and trainings, and promotes consultation and collaboration between state and tribal courts. http://tinyurl.com/c8j7g5k.

The California Department of Social Services regularly releases All County Letters and All County Information Notices. These are often developed in consultation with tribes, and can serve as de facto regulations to instruct counties and tribes on specific aspects of implementing state law and the ICWA.

Finally, tribes and state representatives participate in and contribute to a Statewide ICWA Workgroup, which meets bimonthly to address issues impacting Indian children, families, and tribes in child welfare matters. The state also funds a portion of an annual Statewide ICWA Conference, which is generally hosted by a tribe or Indian organization.

The practical and demonstrable effect of these collaborative bodies reflects California's commitment to preserving tribal culture, Indian families, and Indian children's access to their heritage. It is the fruit of an evolving state policy built in reliance on the ICWA, and one which should not be disturbed because it is working effectively.

CONCLUSION

Given the "historical efforts to eradicate tribalism and Indian identity, a child's status as an Indian today has deeply symbolic, political and practical implications. From the tribal perspective, children were wrongly removed from their families and tribal communities in the past, resulting in the decimation of tribal culture; today they are seen as the key to tribal survival." Barbara Ann Atwood, *Children, Tribes, and States – Adoption and Custody Conflicts over American Indian Children* 30 (Carolina Academic Press 2010).

How the ICWA is presently applied in California was shaped through countless hours and dollars expended by tribes, courts, social service agencies, social workers, court-appointed special advocates, tribal consortia, Indian law practitioners, and the state itself. The ICWA is a major component in the effort to restore California tribes through the protection of

Indian children, and to reverse some of the many historical injustices that Indian people in this state have suffered.

Amici request that this Court uphold the promise of the ICWA and not erode the many advances made in ensuring its implementation in this state.

Respectfully submitted.

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APPENDIX

APPENDIX A – LIST OF *AMICI*

Amici are federally-recognized Indian tribes as listed in the Federal Register at 77 Fed. Reg. 47,868 (Aug. 10, 2012) and California Indian organizations.

California Indian Tribes:

1. *Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California*
2. *Alturas Indian Rancheria, California*
3. *Barona Band of Mission Indians*
4. *Bear River Band of the Rohnerville Rancheria, California*
5. *Big Lagoon Rancheria, California*
6. *Big Pine Paiute Tribe of the Owens Valley*
7. *Big Sandy Rancheria of Western Mono Indians of California*
8. *Bishop Paiute Tribe*
9. *Blue Lake Rancheria, California*
10. *Bridgeport Indian Colony*
11. *Cahuilla Band of Mission Indians of the Cahuilla Reservation, California*

12. *Campo Band of Diegueño Mission Indians of the Campo Indian Reservation, California*

13. *Cher–Ae Heights Indian Community of the Trinidad Rancheria, California*

14. *Cedarville Rancheria, California*

15. *Cloverdale Rancheria of Pomo Indians of California*

16. *Cortina Indian Rancheria of Wintun Indians of California*

17. *Death Valley Timbi-sha Shoshone Tribe*

18. *Elk Valley Rancheria, California*

19. *Enterprise Rancheria of Maidu Indians of California*

20. *Ewiiaapaayp Band of Kumeyaay Indians, California*

21. *Federated Indians of Graton Rancheria, California*

22. *Fort Bidwell Indian Community of the Fort Bidwell Reservation of California*

23. *Greenville Rancheria*

24. *Habematolel Pomo of Upper Lake, California*

25. *Hoopa Valley Tribe, California*

26. *Hopland Band of Pomo Indians, California*

27. *Ione Band of Miwok Indians of California*

28. *Jamul Indian Village of California*

29. *Karuk Tribe*

30. *Kashia Band of Pomo Indians of the Stewarts Point Rancheria, California*

31. *La Jolla Band of Luiseño Indians, California*

32. *Lone Pine Paiute-Shoshone Tribe*

33. *Los Coyotes Band of Cahuilla and Cupeño Indians, California*

34. *Lytton Rancheria of California*

35. *Mesa Grand Band of Diegueño Mission Indians of the Mesa Grande Reservation, California*

36. *Middletown Rancheria of Pomo Indians of California*

37. *Mooretown Rancheria of Maidu Indians of California*

38. *Morongo Band of Mission Indians, California*

39. *Northfork Rancheria of Mono Indians of California*

40. *Pechanga Band of Luiseño Mission Indians of the Pechanga Reservation, California*

41. *Pit River Tribe, California*

42. *Quartz Valley Indian Community of the Quartz Valley Reservation of California*

43. *Quechan Tribe of the Fort Yuma Indian Reservation, California & Arizona*

44. *Ramona Band of Cahuilla, California*

45. *Redding Rancheria, California*

46. *Redwood Valley or Little River Band of Pomo Indians of the Redwood Valley Rancheria California*

47. *Resighini Rancheria, California*

48. *Rincon Band of Luiseño Mission Indians of the Rincon Reservation, California*

49. *Round Valley Indian Tribes, Round Valley Reservation, California*

50. *San Manuel Band of Mission Indians, California*

51. *Santa Rosa Band of Cahuilla Indians, California*

52. *Scotts Valley Band of Pomo Indians of California*

53. *Smith River Rancheria, California*

54. *Soboba Band of Luiseño Indians, California*

55. *Susanville Indian Rancheria, California*

56. *Sycuan Band of the Kumeyaay Nation, California*

57. *Torres Martinez Desert Cahuilla Indians, California*

58. *Tuolumne Band of Me-Wuk Indians of the Tuolumne Rancheria of California*

59. *Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation, California*

60. *Viejas Band of Kumeyaay Indians*

61. *Washoe Tribe of Nevada & California*

62. *Wiyot Tribe, California*

63. *Yurok Tribe of the Yurok Reservation, California*

Indian Organizations:

1. *Indian Child and Family Preservation Program*

2. *Inter-Tribal Council of California, Inc.*

3. *Owens Valley Board of Trustees*

4. *Owens Valley Career Development Center*

5. *Tribal STAR (Successful Transitions for Adult Readiness)*

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-399

Supreme Court, U.S.
FILED
MAR 2 8 2013
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, A MINOR CHILD UNDER THE AGE OF FOURTEEN YEARS, *et al.*,

Respondents.

On Writ Of Certiorari To The South Carolina Supreme Court

BRIEF OF AMICI CURIAE TANANA CHIEFS CONFERENCE, BRISTOL BAY NATIVE ASSOCIATION, ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS, CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA, ALEUTIAN PRIBILOF ISLANDS ASSOCIATION, NATIVE VILLAGE OF BARROW, AND THE ORUTSARAMIUT NATIVE COUNCIL IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The Tanana Chiefs Conference, Inc. (TCC) is an inter-tribal non-profit consortium based in Fairbanks, Alaska. Fairbanks is the regional hub for the 15,623 Athabascan Indians who reside in or come from TCC's small rural village communities across Interior Alaska. TCC's 37 member Tribes have tribal courts and Indian Child Welfare Act (ICWA) workers who actively participate in ICWA proceedings in state and tribal court.

The Bristol Bay Native Association, Inc. (BBNA) is a tribal non-profit consortium controlled by 31 federally recognized Tribes composed of Athabascan Indians, Yupik Eskimos, and Aleuts. BBNA's primary mission is to provide educational, social, economic, and related services to the Native people of the Bristol Bay region of Southwest Alaska. BBNA employs Tribal Children's Service Workers, Youth Activities Coordinators, and ICWA Team Leaders who work closely with member Tribes on ICWA and Child In Need of Aid cases, a task that includes child protection casework and support for tribal courts.

---

[1] All parties have consented to the filing of this brief, as provided by Rule 37.3(a). Letters of consent have been filed with the Clerk of the Court. No counsel for a party authored the brief in whole or in part and no such counsel or party made a monetary contribution to fund the preparation or submission of the brief. No persons other than amici curiae, their members, or their counsel, made a monetary contribution to its preparation or submission.

The Association of Village Council Presidents (AVCP) is an inter-tribal non-profit consortium based in Bethel, Alaska and controlled by 56 federally recognized Tribes. Bethel is the largest town in Southwest Alaska. AVCP provides services to mostly Yupik Eskimos who reside in small, isolated villages scattered throughout the Yukon-Kuskokwim Delta in an area that is approximately 59,000 square miles. The villages are not connected by road to one another, nor to the rest of Alaska. English is a second language for many tribal members, who continue to practice a centuries-old hunting, fishing, and gathering way of life, congregating at home village sites in the winter and moving to fish camps in the summer.

The Central Council of Tlingit and Haida Indian Tribes of Alaska (Central Council) is a federally recognized regional Tribe in Southeast Alaska, with over 28,000 tribal citizens. While some members live in Alaskan urban centers, many live a traditional subsistence lifestyle in the rural island communities dotted throughout the Inside Passage. Central Council has its own child welfare code, operates a tribal court, and serves tribal member children through its ICWA department.

The Aleutian Pribilof Islands Association (APIA) is an inter-tribal organization comprised of 13 federally recognized Tribes situated on the Aleutian Islands, which extend westward over 1,300 miles from the Alaska mainland, and on the Pribilof Islands which lie to the north. APIA's members are distributed over an area of approximately 100,000 square

miles. APIA provides a broad spectrum of services and actively represents its member Tribes and individual tribal members in child welfare matters.

The Native Village of Barrow (NVB) is a federally recognized Tribe on the North Slope of Alaska. NVB strives to protect Inupiat culture, traditions, and self-sufficiency by providing a wide variety of services for its tribal members. The NVB also has exclusive jurisdiction over Indian child custody proceedings involving Indian children who are enrolled or eligible for enrollment with the Tribe, and who are domiciled within the Native Village of Barrow.

The Orutsaramiut Native Council (ONC) is the federally recognized governing body for the Native Village of Bethel. ONC's mission is to promote the general welfare of tribal members, enhance independence and quality of life, encourage self-sufficiency, preserve cultural and traditional values of the Tribe, and to exercise tribal authority over resources through education, economic, and social development opportunities. ONC actively represents member children in ICWA cases.

Together, these Tribes and inter-tribal organizations provide child and family services to most of Alaska's 229 federally recognized Tribes. Such services include the provision of technical and legal assistance to aid tribal ICWA workers in state court ICWA proceedings. Their services also include tribal court training to assist tribal court judges in case management of ICWA proceedings.

Alaska amici and their member Tribes have a fundamental interest in protecting the application of ICWA to children who do not live on reservations. The majority of children who are the subject of foster care and pre-adoption proceedings in Alaska are Alaska Native and do not live on reservations.[2] If this Court accepts Petitioners' contention that a child's off-reservation status should be a determinative factor in ICWA's application, it will directly impact the State of Alaska, its 229 federally recognized Tribes, and tens of thousands of Alaska Native children.

Alaska amici and their member Tribes also have an interest in protecting the legal status quo in Alaska and the interpretations of ICWA rendered by the Alaska Supreme Court, one of the most expert state courts in the nation on ICWA issues. These interpretations have provided essential stability to children, parents, adoptive families, Tribes, and personnel from Alaska's Office of Children's Services.

SUMMARY OF THE ARGUMENT

Congress passed the Indian Child Welfare Act of 1978 (ICWA), 92 Stat. 3069, 25 U.S.C. §§ 1901-1963,

[2] *See, e.g.*, STATE OF ALASKA, DEP'T OF HEALTH & SOC. SERV'S, OFFICE OF CHILDREN'S SERV'S, PROVIDER/PLACEMENT RACE STATISTICS OF CHILDREN PLACED IN FOSTER HOMES ON OCTOBER 1, 2011, *available at* http://dhss.alaska.gov/ocs/Documents/Statistics/pdf/201110_FstrPrvdrRc.pdf.

to ensure that all Indian children have the opportunity to maintain their cultural and traditional heritage, and to participate in the political life of their Tribes. The language of ICWA and its legislative history clearly indicate that Congress intended ICWA's protections to apply to Indian children regardless of whether they or their parents reside on a reservation. This intention is particularly important in Alaska, where, due to the State's unique history, the vast majority of Alaska Natives do not reside on reservations. It is crucial that all of ICWA's protections remain in full effect in Alaska, where the survival of Native tribal communities and culture is at risk due to the disproportionate placement of adopted Native children in non-Native homes.

This Court should reject Petitioners' argument that a determinative factor in ICWA's application is whether the child has a pre-existing connection to a Native family, or was in the custody of a Native parent, when the child or parent does not live on a reservation. This distinction has no basis in the text or history of the statute. The Court is encouraged to look to several decisions of the Alaska Supreme Court that provide guidance on ICWA's interpretation in the context of Alaska's unique history and cultural backdrop.

If adopted, Petitioners' interpretation would gut ICWA's application in Alaska, in direct contravention of Congress's intent. Without ICWA's powerful protections, the progress made by Alaska state officials and Tribes over the last thirty-five years would risk

reversal, exposing Alaska Native children to the precise psychological and emotional harm, and the weakening of Alaska Tribes, that Congress surely intended to prevent.

ARGUMENT

I. The Historical and Cultural Landscape in Alaska Is Unique, and Any Narrowing of ICWA Will Be Detrimental to Alaska Native Children.

Petitioners argue that unless a Native child has a pre-existing connection with her biological Native parent, ICWA simply does not apply in adoption proceedings involving a child not domiciled on a "reservation." *See* Pet. Br. at 17; GAL Br. at 45-46. Petitioners' proffered rationale for this argument is that the federal interests in promoting tribal sovereignty and maintaining Indians as tribal citizens are too attenuated when a child or her parents live off-reservation. Pet. Br. at 17; GAL Br. at 45-46, 54-55. Petitioners' argument directly contradicts ICWA's plain text.

Moreover, because Alaska Natives do not reside on ICWA "reservations," Petitioners' argument would severely undermine Congress's goal of ensuring that ICWA protect all Alaska Natives. In passing ICWA, Congress was acutely aware of Alaska Natives' unique historical, geographic, and cultural status, and expressly included Alaska Native Tribes in the

statutory text. Adopting Petitioners' argument would significantly undercut ICWA in a way Congress surely did not intend. A consideration of the legal status of Alaska Tribes and the congressional intent behind ICWA demonstrates the fallacy of Petitioner's proposal that an Alaska Native child, necessarily living outside any reservation, must have a pre-existing and physical custodial connection with a Native family or Native parent in order for ICWA to apply.

A. As a Result of Alaska's Unique History, Alaska Natives Do Not Reside on "Reservations."

Unique among the aboriginal Indian Tribes[3] in the United States, Alaska's 229 federally recognized Tribes do not reside on "reservations" as that term is used in ICWA. This arrangement results from Alaska's historical development, first as a territory of the United States and then as a State. Nonetheless, Alaska Natives have consistently enjoyed the same legal rights as all other Tribes in the United States, including with respect to ICWA's application. The historical progression of Alaska Natives' land and legal rights supports the conclusion that ICWA continues to apply fully to all Alaska Natives, including

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[3] "The term 'Indian tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. § 479a(2).

all Alaska Native children, regardless of their non-reservation status.

When the United States purchased Alaska from Russia through the 1867 Treaty of Cession, it established that Alaska Natives would be governed by the laws and regulations applicable to all other Native American Tribes.[4] Thus, long prior to Alaska's statehood, the whole body of federal Indian and statutory law applied to Alaska Native Tribes. *See In re Minook*, 2 Alaska 200, 220-21 (D. Alaska 1904); *see also Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272, 285 (1955) (noting "no distinction between . . . use of the land [by Alaska Natives] and that of the Indians of the Eastern United States").

With regard to Alaska Natives' aboriginal lands, the 1867 Treaty neither extinguished nor granted recognized title to any of the Tribes' lands, thereby preserving the status quo. *See Tee-Hit-Ton*, 348 U.S. at 278. Although the federal government occasionally designated reservations to protect tribal interests, tribal aboriginal land titles remained largely unaddressed until Alaska became a state nearly a century later. Alaska Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339, 340 (1958).

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[4] Treaty of Cession art. III, 15 Stat. 539, 542 (1867) ("The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.").

After Alaska became a State in 1959, Alaska Native land rights came into sharp focus. Although § 6 of the Alaska Statehood Act entitled the new State to choose some 103 million acres of federal land for state ownership, Alaska's selection of land used and occupied by Native Tribes produced immediate conflict, litigation, and voluminous tribal protests. *See* ROBERT D. ARNOLD, ALASKA NATIVE LAND CLAIMS 119 (1976). By 1961, Tribes had filed so many land protests that the federal government suspended virtually all dispositions of federal land pending congressional action. *Id.*

The settlement of aboriginal land claims resulted in the 1971 passage of the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601-1629h (2006)). ANCSA reserved to Alaska Natives full title to over 44 million acres of land (including former reservations), extinguished aboriginal title to all other ceded lands, and placed those lands in the public domain.[5] 43 U.S.C. §§ 1603(b), 1605(a), 1611,

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[5] ANCSA left in place the federal government's trust responsibility by preserving Alaska Natives' eligibility to receive all the federal government's Indian trust services, 43 U.S.C. § 1618(b), a provision which, as amplified by § 1626, guarantees for Alaska Tribes precisely the same trust services that the federal government provides to the "Lower 48" Tribes in Indian country. These services include tribal government assistance, financial and employment assistance, educational support, family support, housing assistance, road maintenance and construction, and comprehensive health care. It is thus well established that, "Alaska Natives, including Indians, Eskimos,

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1613(h), 1615(b), 1615(d), 1618(b). ANCSA placed all of these settlement assets, including the land, under the exclusive control of unique Native corporations. 43 U.S.C. § 1602(j). Significantly for purposes of this case, ANCSA did not create reservations; to the contrary, it abolished all reservations which had existed prior to 1971. 43 U.S.C. § 1618(a).

In *Alaska v. Native Village of Venetie Tribal Government*, this Court held that ANCSA land conveyed to a Native corporation, even if subsequently reconveyed to a Tribe, did not constitute "Indian country," a legal term defined in 18 U.S.C. § 1151. 522 U.S. 520, 532-34 (1998). Since ICWA defines "reservation" to mean, *inter alia*, "Indian country as defined in section 1151," 25 U.S.C. § 1903(10), almost none of the land held by ANCSA corporations or Alaska Native Tribes is considered a "reservation" under ICWA. Although the non-reservation status of Alaska Native land was well-known to Congress (which, again, in ANCSA had abolished prior reservations), Congress nonetheless expressly *included* Alaska Native Tribes in ICWA's definition of an "Indian tribe," 25 U.S.C. § 1903(8). Indeed, acting pursuant to Congressional authorization, the Secretary of the Interior subsequently acknowledged that Alaska

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and Aleuts, have the same legal status as members of Indian tribes singled out as political entities in the commerce clause of the United States Constitution." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3][a], at 326 (Nell Jessup Newton ed., 2012 ed.) (citations omitted).

Native Tribes "have the same governmental status as other federally acknowledged Indian tribes." Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993). Accordingly, it is well-established that the sovereign status of Alaska's federally recognized Tribes operates independently of the existence of any reservation lands, and Alaska Tribes are accorded the same rights, privileges, and immunities enjoyed by other Native American Tribes.[6]

Today, Alaska consists of 570,641 square miles, making it the largest State in the Union and twice the size of Texas. U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS (2010), http://quickfacts.census.gov/qfd/states/02000.html. As of the 2010 Census, Alaska's population is 710,231, of whom almost 20% (or 138,312 people) are American Indian and Alaska

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[6] *See* Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (1994) (codified in part at 25 U.S.C. § 479a-1 & 25 U.S.C. §§ 1212-1215 (2006)); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. at 54,366 (noting that Alaska Native Tribes "have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes"); Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47,868, 47,872 (Aug. 10, 2012); *John v. Baker*, 982 P.2d 738, 749 (Alaska 1999) ("[W]e hold that Alaska Native tribes, by virtue of their inherent powers as sovereign nations, do possess [non-territorial] authority [to resolve domestic disputes]").

Native in full or in part. U.S. CENSUS BUREAU, PROFILE OF GENERAL POPULATION & HOUSING CHARACTERISTICS: DEMOGRAPHIC PROFILE DATA (2010), http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml. There are 229 federally recognized Tribes in Alaska,[7] constituting nearly half of the total 565 federal recognized Tribes in the United States. Forty-two percent of Alaska Natives live in small, remote rural communities that are accessible only by boat or small airplane. INST. FOR SOC. AND ECON. RESEARCH, ET AL., *Executive Summary to* THE STATUS OF ALASKA NATIVES REPORT 2004, Vol. 1, at 2 (2004), *available at* http://www.iser.uaa.alaska.edu/Publications/statusaknatives2004-vol1.pdf. Most of the lands in and around these village Tribes were conveyed by ANCSA. *See* 43 U.S.C. §§ 1601, 1613.[8] These communities continue to adhere to their tribal identity, cultures, traditions, and subsistence way of life, and continue to exercise political authority over their members.

However, the continued survival of Alaska Native culture is seriously impacted by the high adoption

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[7] Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. at 47,872; 25 U.S.C. §§ 479a-1(a), 479a(2) (authorizing the Secretary of the Interior to publish a list of recognized Tribes, including Alaska Native Tribes).

[8] *See also* STATE OF ALASKA, DEP'T OF FISH & GAME, ALASKA NATIVE CLAIM SETTLEMENT ACT (ANCSA) LAND CONVEYANCES, http://www.adfg.alaska.gov/index.cfm?adfg=habitatoversight.ancsa (last visited Mar. 22, 2013).

rate of Alaska Native children into non-Native families. The adoption rate of Alaska Native children is severely disproportionate to the adoption rate for the general population. Alaska Native children comprise 22% of all children in Alaska—yet they represent 62% of children who are in out-of-home care.[9] Worse yet, fully 61% of Alaska Native children in foster care will ultimately be placed in non-Native homes.[10] These trends are especially stark in the Anchorage region, Alaska's largest urban center. Even though the child population in Anchorage is only 12% Alaska Native, here, too, 60% of children removed from their homes by the State are Native.[11] ICWA has been the driving force behind tracking these statistics, which assist state and tribal advocates in efforts to reduce these disproportionate statistics in accordance with the law. For this reason, ICWA's continued application to all Alaska Native children is of vital importance.

B. In Enacting ICWA Congress Was Aware of the Unique Status of Alaska and Its Native Children.

When Congress passed ICWA in 1978, just seven years after passage of ANCSA, it was acutely aware

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[9] W. & PAC. CHILD WELFARE IMPLEMENTATION CTR., DATA DASHBOARD WORKGROUP STATUS UPDATE, ALASKA CHILD WELFARE DISPROPORTIONALITY REDUCTION PROJECT 2 (Feb. 2013), App. X.

[10] *Id.* at 7, App. X.

[11] *Id.* at 13, App. X.

of Alaska Tribes' unique geographic, historical, and cultural status. After surveying the statutory language of ICWA, its legislative history, and the cultural context in which it passed, there can be no doubt that Congress intended ICWA to apply fully to the parents and children of Alaska Native Tribes despite their non-reservation status.

The clearest sign of Congress's intention that ICWA apply to Alaska Natives is found in the language of ICWA itself: as already noted, its definition of Tribe expressly includes Alaska Native Tribes. 25 U.S.C. § 1903(8). The congressional record also indicates that at the time of ICWA's passage, Congress was particularly focused on ensuring that the law would protect Alaska Native children. Alaska-specific statistics were presented to Congress and showed that, from 1973 to 1976, 1 out of every 29.6 Alaska Native children was adopted—a rate almost five times higher than non-Native children (1 out of 134.7 children). S. Rep. No. 95-597, 95th Cong., at 46 (1977). Of the Native children who were adopted, 93% were placed in non-Native families. *Id.* Similarly, Alaska Native children were three times more likely than non-Native children to be in foster care. *Id.* Congress was keenly aware that adoptions of Alaska Native children into non-Native homes, through state court proceedings, resulted in the removal of Native children from their Tribes and their Native cultures. Just as clearly, Congress intended ICWA's prophylactic procedural mechanisms to reach all such proceedings.

As was true for other Native American populations across the country, Congress noted the high rates of adoption and foster care placements of Alaska Native children were often attributable to the practice of separating children from their families and sending them to boarding schools or boarding homes—a practice that was "helping to destroy a generation of village children" and encouraging "self-defeating styles of behavior and attitudes, and grief of village parents, not only at their children's leaving home, but also at their children's personal disintegration away from home." *Problems That American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction: Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. 6 (1974) (opening statement of Sen. James Abourezk) (quoting abstracts of study entitled "A Long Way from Home" by Dr. Judith Kleinfeld).

Petitioners ask the Court to consider a Native child's tribal-land residence as a determinative factor (albeit one subject to the flawed "Indian family exception" that they also fabricate without textual basis) in whether ICWA applies to that child's custody arrangements and to the rights of the child's Native parents and Tribe. Congress quite clearly chose not to create such a distinction. To be sure, Congress did distinguish between residence on- and off-reservation for purposes of ICWA's tribal court

jurisdiction provisions.[12] But that is the only instance where this distinction was made, and Congress in all other respects was clear in not treating Native American children caught up in state court proceedings any differently whether they resided on or off a reservation. By urging the Court to imply into ICWA a tribal-land residence or domiciliary distinction, Petitioners therefore ask the Court to thwart Congress's main objective. ICWA was intended to bring *all* Native American children who were eligible for tribal membership under the statute's protection. Nothing in the statutory text or legislative record supports the notion that these protections would vary depending upon whether a case concerned on-reservation children versus off-reservation children. Petitioners are therefore urging the Court to ignore ICWA's statutory language, its legislative history, and the fact that Congress knew that Alaska Native Tribes had no tribal lands at the time of its passage, yet wished to protect the Alaska Tribes' future—their children. It would be bizarre for Congress to have explicitly included Alaska Tribes in one provision, only to implicitly exclude them via the tribal-land distinction urged by Petitioners.

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[12] *See* 25 U.S.C. § 1911(a) ("An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled *within the reservation* of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law.") (emphasis added).

As discussed below, Petitioners' effort to save a sliver of ICWA for Alaska—through the "existing Indian family" exception that has previously been rejected by the Alaska Supreme Court—suffers from the same fatal flaw as Petitioners' argument about ICWA's full application only to Native Americans who live on reservations: it has absolutely no basis in the text of the statute. That Petitioners are forced to graft multiple additions onto ICWA's text, in an effort to save some portion of the statute for Native Americans (including Alaska Natives) whom Congress clearly intended to protect, simply demonstrates the error in Petitioners' approach. Rather, the triggering mechanism for ICWA is and should continue to be based upon a child's membership or eligibility for membership in her Tribe, not on whether the child or parent has a pre-existing relationship with an Indian family or an Indian custodian. *See Hearings on S. 1214 before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong., 97 (1978).

This Court should defer to Congress's intent in this field. Because of the unique historical relationship between Indian Tribes and the United States, *see Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (characterizing relationship as like a "ward to his guardian"),[13] this Court has consistently granted

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[13] *See also* 25 U.S.C. § 1901(2) ("Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of

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considerable deference to Congress in Indian affairs. *See, e.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (holding tribal status is determined exclusively by the political branches of government); *United States v. Kagama*, 118 U.S. 375, 384 (1886) (recognizing that from the United States' relationship to the Tribes "arises the duty of protection"). As long as the special treatment of Tribes can be tied rationally to the fulfillment of Congress's unique obligation towards the Tribes, such legislative judgments will not be disturbed by this Court. *See Morton v. Mancari*, 417 U.S. 535, 555 (1974).

Accordingly, this Court should defer to Congress's stated intent that ICWA apply regardless of whether the child has a pre-existing relationship with an Indian family or was previously in the custody of a biological Native parent.

II. Alaska Courts Have Consistently Recognized That ICWA Is Meant to Promote Tribal Control Over Custody Decisions Involving Alaska Native Children.

Tracking the congressional intent described in Section I, *supra*, the Alaska Supreme Court has consistently held that ICWA supports tribal control

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Indian tribes and their resources"); *Nagle v. U.S.*, 191 F. 141, 142 (9th Cir. 1911); *U.S. v. Cadzow*, 5 Alaska 125 (D. Alaska 1914); *U.S. v. Berrigan*, 2 Alaska 442 (D. Alaska 1905); *Johnson v. Pacific Coast S.S. Co.*, 2 Alaska 224, 241 (D. Alaska 1904).

over custody decisions involving all Alaska Native children. Given that court's specialized knowledge of conditions in Alaska, and its exceptional experience with ICWA matters, this Court should adopt its approach and confirm that ICWA grants broad protections to tribal interests in adoption proceedings involving Native children.

A. Alaska Courts Recognize Tribal Interests in Alaska Native Children Outside Reservations.

The Alaska Supreme Court has firmly rejected Petitioners' theory that the off-reservation status of an Indian child is a significant factor in whether ICWA applies to that child. Decisions of the Alaska Supreme Court, sustaining Alaska tribal interests in Native children outside reservations, are instructive in this regard.

As noted *supra* at 10, this Court in *Native Village of Venetie Tribal Government* held that ANCSA land was not "Indian country," even if subsequently transferred tribal ownership. 522 U.S. at 523. In the wake of *Venetie*, the Alaska Supreme Court in *John v. Baker* addressed the nature of Alaska tribal authority over tribal children in the absence of "Indian country." 982 P.2d 738, 754 (Alaska 1999). The court explained that "the nature of tribal sovereignty stems from two intertwined sources: tribal membership and tribal land." *Id.* (citing *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975)). The court reasoned that jurisdiction

based on tribal membership exists irrespective of tribal land, holding that "federal tribes derive the power to adjudicate internal domestic matters, including child custody disputes over tribal children, from a source of sovereignty independent of the land they occupy." *Id.*

Turning to ICWA in particular, the Alaska court reasoned that "ICWA's goal was to increase tribal control over custody decisions involving tribal children. Congress viewed this increased control as vital to the continued sovereignty of the tribes." *Id.* at 753. Indeed, the "adjudication of child custody disputes over member children is necessary 'to protect tribal self-government or to control internal relations.'" *Id.* at 752 (quoting *Montana v. U.S.*, 450 U.S. 544, 564 (1981)). Subsequent Alaska Supreme Court decisions have reinforced this conclusion. *See Native Village of Tanana v. State*, 249 P.3d 734, 750 (Alaska 2011) ("Alaska Native tribes have inherent sovereign jurisdiction, concurrent with the State, to initiate ICWA-defined child custody proceedings"); *In re C.R.H.*, 29 P.3d 849, 852 (Alaska 2001) (recognizing that in enacting ICWA § 1911(b), Congress expressly authorized tribal transfer jurisdiction over ICWA custody cases from state court to tribal court).

Accordingly, even though Alaska Native Tribes do not inhabit reservations, they retain authority to adjudicate child custody disputes, an authority which operates irrespective of their "off-reservation" status.

B. Alaska Courts Have Rejected the "Existing Indian Family" Exception to ICWA.

Petitioners seek to narrow ICWA's application off-reservation by excluding its reach to children who do not satisfy the so-called "existing Indian family," a doctrine made of whole cloth. That is, they would permit ICWA to apply off-reservation only in the case of a child who had been in the legal or physical custody of an Indian parent. Pet. Br. at 41.[14] The "existing Indian family" exception, however, finds no basis in the text of the statute and embodies a policy judgment that was rejected by Congress and has been rejected by the vast majority of state courts to address this issue.[15] The widespread rejection of this faulty tenet reinforces the conclusion that ICWA was

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[14] As Respondents have noted, Resp. Br. in Opposition at 14-16, Petitioners waived their argument on this issue at the South Carolina Supreme Court. Out of an abundance of caution, this brief addresses the issue anyway.

[15] Nineteen states have firmly rejected the Indian Family Exception, while only seven have adopted it. *See* Resp. Br. in Opposition at 16-17 nn.7-8. *See also* Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Exiting Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 40 (1998-99) (hereinafter *The Past Never Vanishes*) (noting that when Congress passed ICWA, "it was concerned about the coercive actions of states and their insensitivity to tribal cultural values and social norms. By relying on some judicially fashioned level of Indianness to try to manipulate their use of the existing Indian family exception, state courts have established a dangerous precedent that once again opens the door to cultural biases and misunderstandings") (quotations and citations omitted).

intended to focus on the deprivation of a child from its Tribe; other distinctions, such as those based on the child's age, residence on Indian land, or custody status, are not supported by ICWA's language or purpose.

The Alaska Supreme Court was one of the earliest of the 19 States to reject the "existing Indian family" exception. *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989); *see also A.B.M. v. M.H.*, 651 P.2d 1170, 1973 (Alaska 1982) (declining to create a judicial exception). In *T.N.F.*, the court noted that the exception had been consistently criticized by courts in other jurisdictions, and then explained that ICWA was not designed simply to protect the interests of individual Indian parents: "[r]eliance on a requirement that the Indian child be part of an Indian family for the Act to apply would undercut the interests of Indian tribes and Indian children themselves that Congress sought to protect through the notice, jurisdiction and other procedural protections set out in ICWA." *Id.* at 977.

In addition, the court expressed "serious policy reservations" about creating a judicial exception to ICWA in situations where a mother gave up her child shortly after her birth. *Id.* Noting that in such a scenario, the "existing Indian family" exception would deprive both the parent and the Tribe of ICWA's protections, the court underscored this "was exactly the type of scenario in which Congress sought to impose federal procedural safeguards in order to

protect the rights of the Indian parents and their tribe." *Id.*

The court concluded that adopting an "existing Indian family" exception to ICWA "would be to enter onto a slippery slope which threatens to exclude *the very type of cases Congress had in mind when it adopted the Act.*" *Id.* at 978 (emphasis added). This conclusion reinforces the notion that ICWA protects the child's and her Tribe's rights, which exist regardless of whether the child was ever in the custody of an Indian parent.

C. Alaska Courts Have Held That Because of the Tribal Interests at Stake, ICWA Imposes a Higher Threshold Before Parental Rights May Be Terminated.

Petitioners also argue that the father in this case failed to adequately establish his paternity under state law, and for this reason cannot invoke ICWA to block the adoption of his Indian daughter. Pet. Br. at 24-28. Petitioners' argument should be rejected by this Court, as it has been by the Alaska Supreme Court in similar circumstances. Petitioners' interpretation of ICWA gives short-shrift to the tribal interests at stake and would result in an unworkable patchwork of state laws that would defeat ICWA's universal protections.

In *Bruce L. v. W.E., H.E., & Connie J.*, a non-Native putative father of a child born out-of-wedlock

challenged the voluntary adoption of his Native child by an adoptive couple who had obtained the consent of the Native mother. 247 P.3d 966, 969 (Alaska 2011). As in the instant case, the adoptive parents in *Bruce L.* asserted that the father's consent to the adoption was unnecessary because the father had not properly legitimated the child under the strict technicalities of state law.[16] *Id.* at 970-71. After surveying state case law on the subject, the Alaska Supreme Court concluded that in order "to qualify as an ICWA parent an unwed father does not need to comply perfectly with state laws for establishing paternity, so long as he has made reasonable efforts to acknowledge paternity." *Id.* at 979. Applying this less stringent standard, the court held that if the child was a Native child, the father's reasonable efforts to establish paternity were sufficient, and his failure to strictly comply with the technicalities of the state statutory scheme did not render ICWA inapplicable. *Id.* at 977-78.

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[16] *See* ALASKA STAT. § 25.23.050(a)(3) (incorporating ALASKA STAT. § 25.23.040(a)(2)) (providing consent to adoption is not required of a minor's father if the father was not married to the mother at or after the time of conception or the father has not adopted or "otherwise legitimated the minor under" Alaska law). Although the father in *Bruce L.* had filed an acknowledgment of paternity and an affidavit of paternity in the underlying adoption case, those documents failed to technically legitimate the child under state law because the mother had not signed them. *Bruce L.*, 247 P.3d at 970.

This "reasonable efforts" test, which *Bruce L.* noted has also been adopted by Arizona, New Jersey, California, South Dakota, and Texas, *id.* at 978-79, and is a balanced approach consistent with this Court's precedent and Congress's intent to require a higher threshold before the rights of parents of Indian children can be terminated. *See* 25 U.S.C. § 1921 ("In any case where State or Federal law applicable to a child custody proceeding . . . provides a higher standard of protection to the rights of the parent . . . than the rights provided under [ICWA], the State or Federal court shall apply the State or Federal standard.").

Here, had the adoptive couple in the case *sub judice* moved to Alaska, strict compliance with state paternity law would not have been required under *Bruce L.*, nor would the father have been required to show that he communicated meaningfully or provided care and support for the child for at least one year, as Alaska state law requires in non-ICWA cases. ALASKA STAT. § 25.23.050(a). Thus, if Petitioners' argument were accepted, the father's rights under ICWA would be protected in Alaska but not in some other States.

Congress could not have intended that a father be granted ICWA's protections in one State but denied those same protections in another State. As this Court noted in *Mississippi Band of Choctaw Indians v. Holyfield*, in adopting ICWA Congress "intended a uniform federal law," reasoning that "a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport

from one State to another, cannot be what Congress had in mind." 490 U.S. 30, 46-47 (1989). The same logic should apply here. Petitioners' interpretation of ICWA would result in a lack of uniformity in the application of a critical federal statute—a result this Court should reject.

III. Important Progress in Alaska Tribal-State Relations Would Be Undermined If This Court Accepts Petitioners' Arguments That ICWA Imposes Distinctions Based on Race and Residency on Tribal Lands.

Petitioners' claims that ICWA's protections should be severely limited because they impose distinctions based on race and reservation status, Pet. Br. at 17, 44-47, are based on a misunderstanding of ICWA's language and purpose. As discussed more fully in Cherokee Br. at 32-34, and as this Court has repeatedly held, distinctions like ICWA's that depend on membership in a Native American Tribe are political distinctions, based on the sovereignty and particular history of the Tribes (including Alaska Native Tribes) and the United States. *See Mancari*, 417 U.S. 535; *U.S. v. Antelope*, 430 U.S. 641 (1977). Indeed, of paramount importance to Congress in enacting ICWA's statutory scheme was to ensure that Indian children who are eligible to be members of a Tribe, and whose parent is a member of a Tribe, will remain connected to the Tribes of which they are members and citizens, thereby permitting and facilitating their participation in the privileges inherent in

tribal citizenship and to hold fast to their cultures, languages, values, and identities that form an integral part of their tribal connection. Thes factors are not race- or land-based.

By focusing ICWA on access to tribal citizenship, culture, and tradition, Congress sought to reduce the significant psychological challenges faced by Indian children adopted by non-Indian families. *See* S. Rep. No. 95-597, 95th Cong., at 1-2 (1977) ("The separation of Indian children from their natural parents . . . is socially and culturally undesirable. For the child, such separation can cause a loss of identity and self-esteem, and contributes to the unreasonably high rates among Indian children for dropouts, alcoholism and drug abuse, suicides, and crime."); Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 333-36 (2008) (hereinafter *Permanency v. Biology*) (citing *Holyfield*, 490 U.S. at 33 & n.1); Carol Locust, *Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children*, ONTARIO ASS'N CHILD SOC'Y J., Oct. 2000 (hereinafter "*Split Feathers*"), App. 6-8.

Congress was right to emphasize the mental and cultural well-being of these children, as research shows that adoptees often struggle with their identities, leading to increased behavioral problems and feelings of shame, rejection, and low self-esteem. *See* Maldonado, *Permanency v. Biology*, *supra* at 326. These feelings are exacerbated in adopted Indian children who are effectively severed from their historical roots

and therefore never learn about their culture. *See* Irving N. Berlin, *Anglo Adoptions of Native Americans: Repercussions in Adolescence*, J. AM. ACAD. OF CHILD PSYCHIATRY, 1978, 17(2), at 387-88.

These culturally isolated adopted Indian children—who suffer from what is often called "Split Feather Syndrome"—frequently experience a loss of identity and are at a greater risk of enduring long-term emotional and psychological problems.[17] Locust, *Split Feathers*, *supra* at App. 6-8. In one study, "Split Feather" adoptees reported abusing alcohol as a coping mechanism, the vast majority did not graduate from high school, and not a single adoptee described herself as a success. *Id.* at App. 15-18.

When "Split Feather" adoptees are actually able to culturally connect with their heritage, they often improve considerably. Many adoptees indicate that after connecting with their tribal roots, they experienced less alcohol and drug abuse, less depression, less violence, and greater overall happiness.[18] Locust,

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[17] For additional discussions of the Native identities of Native children who are raised in non-Native families, *see* Ronald M. Walters, *Goodbye to Good Bird: Considering the Use of Contact Agreements to Settle Contested Adoptions Arising Under the Indian Child Welfare Act*, 6 U. ST. THOMAS L.J. 270, 282-83 (2008); Jeannine Carriere, *Promising Practice for Maintaining Identities in First Nation Adoption*, FIRST PEOPLES CHILD & FAM. REV., January 2007, at 46, 54.

[18] In addition, studies have consistently shown that Indians often do want to connect to their traditions and history. *See* Stephanie Woodward, *Native Americans Expose Adoption Era and Repair Its Devastation*, INDIAN COUNTRY TODAY MEDIA

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Split Feathers, supra at App. 18-21. As one adoptee explained, "[t]he weight of hurting, loneliness, anger and sorrow I carried all those years was dropped, and my soul could soar." *Id.* at App. 20.

Studies show that the psychological damage of cultural separation begins at a very young age. Even those Indian children who are adopted in infancy have shown the adverse psychological effects of being raised in a non-Indian home. Indeed, research conducted by Dr. Joseph Westermeyer, a social psychiatrist who testified to Congress about ICWA, indicated that Indian children adopted in infancy endured cultural confusion that led to social and psychological problems. *See Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 33 (1989) (citing *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong., 46 (1974)); *see also* Solangel Malonado, *Race, Culture and Adoption: Lessons from* Mississippi Band of Choctaw Indians v. Holyfield, 17 COLUM. J. GENDER & L. 1, 7 (2008). There is no doubt that adoptive parents are often well-intentioned, but the studies above demonstrate that good intentions

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NETWORK (Dec. 6, 2011) http://indiancountrytodaymedianetwork.com/article/native-americans-expose-the-adoption-era-and-repair-its-devastation-65966. *See also* Andrea V.W. Wan, *The Indian Child Welfare Act and Inupiat Customs: A Case Study of Conflicting Values, with Suggestions for Change,* 21 ALASKA L. REV. 43, 66 (2004); Barbara Bennett Woodhouse, *Are You My Mother: Conceptualizing Children's Identity Rights in Transracial Adoptions,* 2 DUKE J. GENDER L. & POL'Y 107, 110-11 (1995).

do not function as a substitute for actual interaction with the child's Tribe.[19]

Thus, one cannot lightly dismiss ICWA's important emphasis on an adopted Indian child's continued access to her Tribe, and the culture and traditions that are a part of her Tribe.[20] Petitioners misread ICWA by placing their focus on whether the child or parent lives on tribal land, or whether the child, adopted at birth, was in the custody of an Indian parent. But the culture and traditions protected by ICWA still exist even in the absence of tribal land and preexisting custody. Similarly, Petitioners are wrong to suggest that ICWA imposes improper race-based classifications. Participating in the life of one's Tribe, just like participating in the life of one's Nation, does not mean that an adoptee must be surrounded by people who look like her. Indeed, it is common for non-Indian families to live within tribal

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[19] As one Native adoptee said, her non-Indian adoptive parents were able to give her everything—"except my Native American identity." Locust, *Split Feathers, supra* at App. 21. *See also* Barbara Ann Atwood, Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance, 51 EMORY L.J. 587, 665-67 (2002).

[20] *See* Graham, *The Past Never Vanishes, supra* at 40 (noting that Indian children have a unique relationship with their Tribe that is rooted in membership customs and laws that "serve the same overarching goals that family laws of individual states serve in 'protecting the best interest of a child.' Citizens of those states must abide by state law just as members of American Indian nations are similarly bound by tribal law and custom").

communities, and Tribes are supportive of these families as adoptive placements, particularly when these families connect their adopted children with their extended Indian relatives.[21]

Since its passage, ICWA has been the driving force behind Alaska's efforts to ensure that Native children are able to access and interact with their Tribes, their cultures, and their traditions. ICWA's requirement that state courts and child welfare agencies consider the cultural aspects of a child's custody placement has resulted in the development of productive working relationships between state and tribal workers in Alaska as they seek to achieve that goal.[22] If accepted, Petitioners' interpretation of ICWA

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[21] For example, a Cultural Connection Agreement form was developed by amici Central Council and is now widely used by Tribes around the state. App. 1-5.

[22] An illustrative example of the success of ICWA working groups in Alaska is the Tribal/State Collaboration Group (TSCG), which consists of state officials and tribal representatives from throughout Alaska who meet regularly to address issues affecting Alaska Natives. *See* MELISSA H. JOHNSON & MARY I. ARMSTRONG, W. & PAC. CHILD WELFARE IMPLEMENTATION CENTER, ALASKA CHILD WELFARE DISPROPORTIONALITY REDUCTION PROJECT MID-PROJECT ASSESSMENT REPORT (2012), App. 28-29. TSCG has expended significant effort to reduce the disproportionate representation of Alaska Native children in the Office of Children's Services system by developing Tribe-licensed foster care standards and in-home service models, *id.* at App. 33-34, 38-39, 40-42, and implementing advanced ICWA training for state and tribal child welfare workers, *id.* at App. 28-30.

would significantly undermine this progress to the detriment of Alaska's Native children.

CONCLUSION

As this Court has noted, ICWA "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society . . . by establishing 'a Federal policy, that wherever possible, an Indian child should remain in the Indian community.'" *Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23 (1978)). This Court should reject Petitioners' arguments and affirm these important legislative goals because "there can be no greater threat to essential tribal relations, and no greater infringement on the right of the tribe to govern themselves than to interfere with tribal control over the custody of their children." *John*, 982 P.2d at 753 (citations, quotations, and alteration omitted). The

judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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CULTURAL CONNECTION AGREEMENT FOR _____ [name(s) of children]

This Cultural Connection Agreement (hereinafter "Agreement") is entered into this _____ day of _____, 20___, by and between _____[names of foster/adoptive parents] (hereinafter "adoptive parent(s)"), _____[names of relinquishing parent], (hereinafter "biological parent(s)"), the _____ Tribe (hereinafter "the Tribe"), and the State of Alaska's Office of Children's Services (hereinafter "OCS"), regarding the placement and prospective adoption of _____[name(s) child/children], dob _____, (hereinafter "the children") with the adoptive parent(s). The terms of this Agreement are binding upon all parties and, if incorporated into the Court's termination order, are subject to judicial enforcement pursuant to A.S. §§ 25.23.180(l) and 47.10.089(g).

WHEREAS, it has been determined that the children are members of the _____ Tribe, a federally recognized Indian Tribe. The biological parents, the adoptive parents and the Tribe maintain that it is in the children's best interest to establish and maintain contact with their extended family and their Alaska Native culture.

WHEREAS, the adoptive parent(s), the biological parents, the Tribe and OCS are all committed to the goal of preparing the child(ren) to lead safe, healthy and successful lives. To achieve that end, the parties agree that the child(ren)'s emotional, social, mental,

cultural, spiritual and physical needs must all be met. The purpose of the Agreement is to address those needs.

AGREEMENT

Now, therefore, the biological parents, the adoptive parents, the Tribe, and OCS all agree to the following:

1. The adoptive parents shall maintain regular contact with the children's extended family as described in paragraphs 3 and 4 below.

2. The adoptive parents shall support the children's cultural identity by doing the following:

   a. Learn and teach the children about their _____ culture and heritage;

   b. Involve the children in age-appropriate activities and programs, including but not limited to language classes, culture camp, and native dance classes, which foster awareness of their _____ heritage;

   c. Encourage the children to participate and attend tribal events; and

   d. Facilitate and encourage the children to participate in visits with their extended biological family.

3. The in-person visitation between the children and their relatives, including but not

limited to _____[names of relatives], shall consist of regular visits held at least _____[state time frame, i.e. quarterly, monthly]. Additional visits may occur as deemed appropriate by the adoptive parents. The visits shall be initiated by _____ [name of person] by calling _____ [name of person] to schedule a mutually agreeable time and location. The adoptive parents shall keep biological relatives informed of their contact numbers. Relatives may not consume non-prescription drugs or alcohol during or within 24 hours of the visit. The relatives are responsible for the cost of any transportation outside of _____ [community child resides]. In addition to in-person contact, the adoptive parents shall facilitate age-appropriate contact with relatives by telephone, email, texting, letters, cards and gifts.

4. _____

_____

[Enter any other terms you wish to add to agreement.]

5. If conflicts with this Agreement arise, the adoptive parents, the biological parents, the Tribe, and OCS shall collaboratively discuss the conflict and, if necessary, amend the Agreement in writing.

6. Contingent upon the adoptive parents' compliance with the terms of this agreement, the Tribe and the biological parents agree to

waive the placement preference standards as set forth in the Indian Child Welfare Act (ICWA), consent to the placement of the children with the adoptive parents, and consent to the adoption of the children by the adoptive parents. In accordance with A.S. 47.10.089(d), the biological parents have exercised their right to retain certain privileges with respect to the children. Should the adoptive parents fail to honor these privileges or comply with the terms of the Agreement, the biological parents are entitled to seek judicial enforcement under A.S. § 25.23.180(l) and 47.10.089(g).

7. If approved, this Agreement shall be incorporated into the Court's termination order in Case No. _____ [CINA case number], with the recommendation that it be included in the children's subsequent adoption order pursuant to A.S. § 47.10.089(e).

IN WITNESS WHEREOF, the undersigned parties acknowledge the execution of this Agreement to be their voluntary act and wish:

_____

Printed Name:_____

Foster Parent

_____

Printed Name:_____

Foster Parent

_____

Printed Name: _____

Mother

_____

Printed Name: _____

Father

_____

Printed Name: _____

Tribe Representative of _____

_____

Printed Name: _____

Office of Children's Services

_____

Printed Name: _____

Guardian ad Litem

_____

[LOGO] ontario association of children's aid societies

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Split Feathers . . .
Adult American Indians Who Were Placed In Non-Indian Families As Children

By Carol Locust

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The Indian Child Welfare Act (ICWA) of 1978 was designed specifically to stop the wholesale removal of Indian children from their families, which had contributed to the destruction of the traditional extended family structures and Indian community life for over a century. A follow-up study in 1980 by the Colorado Indian Law Review revealed that the Act only slowed the removal of children but did not stop it as the Act was intended to do. Tribal leaders called upon the Supreme Court to assure enforcement of the ICWA until amendments could be made to the Act to tighten loopholes through which many Indian children are still being snatched. At this writing, the amendments have not been made.

The pilot study conducted by this investigator indicated that every Indian child placed in a non-Indian home for either foster care or adoption is placed at

great risk of long-term psychological damage as an adult. There is, however, a lack of sufficient research dedicated specifically to the investigation of this issue. Data supporting the statement of at risk adult American Indian adoptees come from the Congressional Hearings pursuant to the Indian Child Welfare Act (1978). Essentially, the issue of the adult Indian who was placed in a non-Indian home as a child has not been addressed.

The literature that does exist on adult Indians who have experienced out-of-culture placements as children, including the preliminary study conducted by this investigator on which this article is based, indicates that nineteen out of twenty Indian adoptees have psychological problems related to their placement in non-Indian homes.

The study determined that *there* are *unique factors of Indian children being placed in non-Indian homes, that create damaging effects in the later lives of the children.*

This study has revealed that

- placing American Indian children in foster/adoptive non-Indian homes puts them at great risk for experiencing psychological trauma that leads to the development of long-term emotional and psychological problems in later life
- the cluster of long-term psychological liabilities exhibited by American Indian adults who experienced non-Indian placement as

children may be recognized as a syndrome (Syndrome: a set of symptoms, which occur together. From *Dorland's Medical Dictionary, 24th edition, 1965.)*

- the Split Feather Syndrome appears to be related to a reciprocal-possessive form of belongingness unique to survivors of cultures that have faced annihilation

The Split Feathers themselves have identified the following factors as major contributors to the development of the syndrome, in order of their importance

1. the loss of Indian identity
2. the loss of family, culture, heritage, language, spiritual beliefs, tribal affiliation and tribal ceremonial experiences
3. the experience of growing up being different
4. the experience of discrimination from the dominant culture
5. a cognitive difference in the way Indian children receive, process, integrate and apply new information – in short, a difference in learning style

Other contributing factors included physical, sexual and mental abuse from adoptive family members; loss of birth brothers and sisters; uncaring or abusive foster/adoptive families; not being told anything or being lied to about their adoption; not being given advanced notice of moves; too many moves; nobody to talk to; loss of personal property.

The following sections will explore the five major factors listed above that contribute to the development of the Split Feather Syndrome.

The Loss of Indian Identity

The loss of American Indian identity appears to be one of the most important factors in the development of the Split Feather Syndrome. The data indicate that the loss of the Indian identity is not the same as the loss of personal identity, although it included the personal aspect. Additionally, however, is the loss of belonging to one's real culture. Almost all of the respondents indicated a defiant, almost fierce pride in being an American Indian. When questioned about what the Indian identity was, the responses repeated most frequently were " I belong to that tribe;" "That is *my* tribe." The individual belonged to the tribe, and the tribe likewise belonged to him or her, a reciprocal possessiveness of cultural identity which may be found in members of other cultures who have undergone great grieving, such as the survivors of the Holocaust.

The belongingness of tribal identity also seemed to embody the reason for one's being "different," the roots of ancestral pride, the foundations of mystical beliefs and tenets and, as one respondent wrote, "the drums that thunder in my blood." The Indian identity, in those terms, meant much more than personal or family identity. It became the totality of the person's existence without which he or she was nothing.

The Loss of Family, Culture, Heritage, Language, Spiritual Beliefs, Tribal Affiliation And Tribal Ceremonial Experiences

The reciprocal possessiveness of the factors listed above (loss of family, culture, heritage, etc.) indicated that Split Feathers not only felt a loss of these "possessions" because they were his or hers by birthright, but also that the individual was the "possession" of the things identified here. For example, not only did the individuals mourn the loss of their families, but they also mourned their families' loss of them as well. The loss of their biological family, extended family, clan and tribe was an unending grief for the respondents, a grief that spawned deep-seated resentment and hatred for the adoption system.

Their biological relatives belonged to them, and they belonged to their relatives, a belongingness that connected the adoptees with relatives, clan members and tribal members. They could see in other Indians a reflection of themselves, a fact that satisfied the human need to be like those around them.

The loss of culture, heritage and language seemed to encompass the total lifestyle that the respondents had missed. One said, "I was supposed to have a naming ceremony when I was two years old, and I didn't get it. I don't have a name. How can I go back to my tribe if I don't have a name?" Another wrote, "Somebody said that we could learn all we needed to learn about our culture and heritage from books and videos from our school. What a laugh! What we got

was a watered down, Indian-style-Sesame-Street version of what some white person thought all Indians were like."

All of the Split Feathers said they read books, watched TV shows and saw movies about Indians when they were children. No matter what the plot of the story, they championed the Indians, even when John Wayne was on the winning side, even, the majority said, when the Indians were portrayed as brutal savages, drunks or dirty thieves. Their feeling toward real life Indians was not any different.

"They told me my parents were alcoholics and that I was lucky to be out of the home," one respondent said. "But I don't feel that way. Poor Mom, poor Dad, maybe I could have helped some way. I'll never know. I never had the chance to find out.

Nobody ever asked me if I wanted to stay or not, they just drove up one day and took me.

My mother had this horrible, disbelieving look on her face. I never saw her again."

Despite the negative portrayal of Indian people in the media and in most non-Indian people's minds, the respondents were proud to be Indian.

Many of them had been told horror stories about their birth families, which always ended with "aren't you glad you came to live with us?" The fact was that most of the stories expounded on the negative aspects – rather than the positive aspects – of the biological

families and were twisted versions of the truth or were outright lies. None of the respondents said they were "glad" about their adoptive placement.

Tribal spirituality seemed to transcend the adoptive experience. All of the respondents regarded themselves as being spiritual, either in an organized church, a personal religious way or in their tribal belief system. Of the twenty respondents, Fourteen reported having extrasensory experiences from childhood, ranging from knowing about things before they happened, having dreams that came true, knowing what someone else was thinking and being able to communicate with animals. Seventeen of the respondents said they had actively sought more information about their tribal traditional beliefs, hoping to find explanations for the mystical experiences in their lives or learn more about their own tribal beliefs.

Most of the respondents viewed tribal ceremonial experiences as an integral part of spirituality. While eleven of the twenty had been able to experience at least one tribal ceremony, nine had not had the opportunity. Thirteen of the twenty had attended at least one Indian pow-wow or celebration, while seven had been denied the privilege but expressed optimism about attending one in the future. Four of them had taken part in sweats. One of the twenty said he was allowed to attend Indian celebrations as a child.

Re-entry into the culture took place after the Split Feathers had reclaimed their Indian identity. Sixteen of the twenty respondents said they were ignorant or

knew very little about traditional ceremonies that they'd missed over the years, although four of them knew about several of their tribal customs and traditions associated with ceremonies. All of them felt they had been robbed of the ceremonies that other tribal children were given but that they had never experienced. All twenty of them said they had several pieces of Indian art, such as jewelry, pottery, basketry or such that held a ceremonial meaning for them. One individual had been given a ceremonial eagle feather. Tribal affiliation – being enrolled in a tribe – was a serious subject for all twenty of the Split Feathers. Sixteen of them had had their enrollment cancelled when they were adopted into non-Indian homes. The names of four had remained on tribal rolls. At the time of this study, six of them had two sets of birth records, one of Indian ancestry bearing their birth names and family names, and another set bearing their adoptive names. The one respondent who had not yet found his Indian identity had been searching archival records for years trying to locate some clue to his tribal affiliation.

"Those pieces of paper – the adoption papers – took away my Indian rights," another respondent wrote.

"Those papers took away my entitlement to my land settlement money, my right to live on tribal land, to vote in tribal elections, to apply for tribal scholarships, my right to be an Indian. My birthright was stolen from me. But they could not take away the fact that I was an Indian. I burned those papers. I hated them."

Growing Up Being Different

In describing what they meant by being "different", the Split Feathers used such words as dark skin, black hair, dark eyes and "the Indian look". Besides physical differences they also included having different philosophical concepts, even though most of them had been adopted too young to have learned any tribal philosophy. The fourteen respondents who said that they had extrasensory experiences felt that this ability made them even more different.

The differences made them feel alienated from other people. All of the Split Feathers said that they were extremely self-conscious. Some were painfully shy and withdrawn as children; others became belligerent and aggressive.

Being different also included the concepts that non-Indians had of them, e.g., Indians had certain traits (stoic, brave), behaved certain ways (never showed emotion, spoke very little), had certain knowledge inherent in their blood (when it was going to rain, herbal remedies). These imposed expectations were burdensome to most of the Split Feathers, who felt guilty because they could not fulfill them. One respondent said it made her feel like a "fake" Indian because she could not fit the stereotype of "Indian". Nine of the twenty respondents said that they felt frustrated and angry because of the unfair expectations placed on them, while the opportunities to be all that was expected of them as "Indians" had been taken away.

Although being different created major psychological problems for the Split Feathers, it was also a source of intense pride.

One respondent wrote, "Being different was horrible, like being a freak. At the same time I was proud. Feeling horrible and proud about the same thing splits your brain apart. You hate what it does to you."

Experiencing Discrimination from the Dominant Culture

All twenty of the respondents in the random sample experienced some degree of discrimination. Words used to describe the cause of discrimination were "being dark", "being Indian", and "not being white", discrimination came from adults as well as children and occurred within the adoptive families; from relatives and neighbours; and at schools, churches and social functions. The average age when "knowing I was different" began at three years of age; the average age when discrimination began to be a serious problem for the respondents was 11 years.

Puberty was a traumatic time for all the respondents when they learned that their limited acceptance in the non-Indian world did not include dating white youth. Thirteen of the 20 reported some amount of alienation from their adoptive families during this period, from hostility to acting out rage and running away. The estrangement increased as the adoptees reached young adulthood. "I asked a girl to dance

with me at a junior high party. Her brother dragged me outside and beat me up, told me no dirty Indian was going to get close to his sister," one respondent wrote. Another respondent wrote that as a young girl she never got asked out on dates. Her adopted mother told her to "go find yourself an Indian." That was the first time she realized that she was not being asked out because of her race.

Discrimination was also felt in the work force as well as in the social realm when "Split Feathers reached adulthood. Jobs often went to less qualified non Indians. Promotions were slow in coming, infrequent or denied. One respondent stated that he felt employers never really trusted him because he looked so "Indian" and that his appearance was against him in obtaining employment. Another wrote, "I had just gone through the alcohol rehab program. I was pleased that I had been sober for three months. In the program I had the opportunity to do a sweat, and I really hung on to that experience, to that little bit of the Indian world. Then I went to the state VR office to get help in finding a job. They told me to cut my hair. My long hair was the only part of me that I could claim as my heritage. I said I wouldn't cut it. They said forget about working, no one would hire me looking like a wild Indian, only if I looked tame."

Cognitive Differences in the Way Indian Children Receive, Process, Integrate and Apply New Information (A Difference in Learning Style)

Based on the Split Feather testimonies, it would appear that American Indians have a cognitive process different from non-Indians. While all 20 of them said that they felt that they were average or above in intelligence, half of them had spent time in remedial education programs in school. Five respondents had been labeled as Learning Disabled. Two were classified as "slow learners." All of them had failed at least one grade in school. The reasons for academic problems were given in episodes. "I just couldn't learn like all the other kids. The teacher talked too much, too many words. I learned better through my eyes."

"When I was in the fifth grade I got punished in front of the whole class for not remembering the capital city of Wyoming. That's when I decided to learn my own way, not theirs. I worked out my own strategy all by myself. My adopted family didn't know what I was doing so they couldn't help me . . . I kept thinking either there's something wrong with my brain or theirs, because our brains don't work the same way when it comes to learning. And since I was the only Indian in the class, I figured out that there was something wrong with my brain. It was frustrating; I hated school. I could learn okay, and fast outside school, but in my school lessons I had to do it their way, not mine. And I failed."

Reading was the most difficult subject for the Split Feathers. Surprisingly, math was not that difficult. "Numbers are logical," said one respondent. The overall picture of the educational success of the Split Feather group was rather dismal, however. The inability to absorb information in the same manner as the other children engendered failure for them, and failure begat more failure, poor self-esteem and often either withdrawal or aggression. Frustrations in elementary school led to difficult junior high school years and early drop-out rates in high school. Of the 20 respondents, only five completed a high school degree. Of the other 15, one went into the military, three were in correctional facilities, four got married and the other seven entered the job market with little or varying degrees of success.

Later in their lives, six of them had either taken college courses or attended advanced training for job placement. None of them described themselves as a success. Although one respondent said he was "doing all right."

The Effects of Reclaimed Indian Identity on the Split Feathers

For nineteen of the twenty individuals in this preliminary study (one had not yet found his tribe nor his tribal identity), repatriation or reclamation of their tribal identity was described as a rebirth experience. Although fear of not being accepted was a major personal problem, and threats of being disowned

came from adoptive parents, all of them said they were glad they had pursued their quests to find out who they were.

Descriptors used for the experience were

- "I felt whole for the first time in my life."
- "Thank God I finally know who I am!"
- "I finally found what I am, what is part of me, what I am part of."
- "I found the missing part of me and put it back in place. Now I can really be alive."
- "I found where I really belonged, my place, my home, my true identity."

When asked how they felt about rejoining a cultural group that was frequently described in degrading terms (drunk Indians, lazy, dirty, stupid) and against which there were many racist, bigoted and prejudiced people, not one of the Split Feathers said they would change their minds. From their responses, it appeared that social, economic and cultural labels had no impact whatever on their repatriation decisions. Most of them said they began helping their birth families and relatives as soon as they found out who they were. They received tribal teachings in return, a reciprocal process that satisfied the needs of the whole family.

Eighteen of the nineteen respondents who had reclaimed their Indian identity said their personal lives had changed dramatically for the better after the

reclamation. A good description of the change, written by one respondent, reads, "The weight of hurting, loneliness, anger and sorrow I carried all those years was dropped, and my soul could soar." Another said, "It's like I was blind, stumbling through life looking for myself, and now – now I can see."

The respondents used the following statements to indicate the profound change in their psychological health, in order of how often the [sic] were repeated

- decrease in depressive feelings
- decrease in alcohol and drug abuse
- decrease in aggressive behaviours
- increase in self-esteem
- feelings of love, joy, generosity, sympathy, understanding
- feelings of finding a purpose in life
- increase in spiritual activities
- increase in days worked (working more regularly, finding a job, and getting a better job)

Other changes mentioned were

- spending more time with my own family
- spending leisure time constructively
- making a commitment to carry through with my responsibilities

- paying more attention to the needs of other people
- learning more about my tribe and my spiritual beliefs
- going back to school to get my GED
- taking care of myself
- looking at the sky instead of the dirt (dreaming dreams again)
- smiling a lot more often

About the author

Carol Locust is Training Director for the Native American Research and Training Center at the University of Arizona College of Medicine. Her work involves counselling and employment issues with people with disabilities. She also works with traditional medicine and ceremonies as a part of current healing practices. Carol is a member of the Eastern Band of Cherokee Nation.

In their own words . . .
What Split Feathers say

"They gave me everything a child could ever ask for, except my Native American identity. All my years growing up in school I was cut down and made fun of because I was Indian. I was darker, had dark hair, and I was 'different'. I grew up resenting who I was,

what I was; of course I kept all the shame to myself, therefore building resentment. I am waiting now for enrollment in my tribe and waiting to establish contact with my biological family. I wish I had grown up being proud – like I am proud today."

"My foster mother was very abusive. She always said we were dirty because we were dark. She beat us often, made our noses bleed. But the worst thing she did was denying us our Indian heritage. Courts should never let anything like this happen. Indian children need to be with Indian families, not white families that are so different from Indian."

"Adoption causes such intense inner pain that you do anything just to get away from it. No one understands you, you are different, and there's no one to talk to. You withdraw into yourself, keep it all inside. That's how I got into trouble with alcohol. It was pain medicine."

I was adopted at age four, started school just before five, grew up in a middle class family that was okay. But I started having dreams about age five about being taken away (from the adoptive home), taken back to my family, by Indians. My family didn't pay much attention to the Indian spirit within me, or to me, either. I communicated more with animals than I did people. In the sixth grade I started having problems with the other kids. Whites, Mexicans and others didn't like me because of being Indian. I got into lots of fights and became a loner."

"I am 72 years old. I was adopted into a white family at age one-and-a-half when my mother died. I realized I was different before I ever went to school. When I asked, my foster parents told me I was Indian, and from that day I identified with Indians, because that was what I was. I didn't know who I was, and that heartache and anguish has been with me for nearly 70 years. I hope your study can help me find out who I am before I die. I don't want to die not knowing my true identity. They (the government) sealed my birth certificate so I could never find my identity and never see my blood relatives. The pain of this is never ending."

Alaska Child Welfare Disproportionality Reduction Project Mid-Project Assessment Report

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August 9, 2012

I. Introduction

The Alaska Child Welfare Disproportionality Reduction Project is funded by the Children's Bureau as a four year implementation project that embraces cultural competence and interagency collaboration as its core operational framework. This project is a collaboration of 16 Alaska Title IV-B Tribal partners with the support of the Office of Children's Services (OCS), Alaska Department of Health and Social Services, and the Court Improvement Project (CIP). The project's primary objective is to significantly reduce disproportionality of Alaska Native children through practice and decision-making changes at the front end of the child welfare system. In doing so, the project seeks to implement changes in child welfare practice for Alaska Native children, youth, and families, with particular focus on key changes in initial safety assessments, the delivery of tribal in-home services and placement decisions. The project promotes the use of a family-centered, state-tribal bi-lateral,

collaborative approach in which OCS will rely more heavily on Tribes to participate in the initial decision making and service delivery. The project is also designed to build the capacity of the tribes to provide community-based services needed by identified families to prevent out-of-home placement whenever possible, and to promote Tribal placement settings when out-of-home placements are necessary.

As one of the projects funded under the Western and Pacific Implementation Center (WPIC), the Alaska Child Welfare Disproportionality Reduction Project is being evaluated by WPIC's evaluation partner, the University of South Florida (USF). This evaluation is guided by the Alaska project logic model and work plan, and WPIC's theory of systems change. The purpose is to assess the extent to which proposed project activities are completed and desired outcomes are achieved, as well as the technical assistance strategies that have helped to build implementation capacity. The data presented here covers the period from November 2010 up to June 2012. The report is intended to provide a mid-project evaluation and is structured around four evaluation components: 1) assessment of current capacity to implement systems change; 2) assessment of the process of implementing proposed system changes; 3) assessment of progress towards achieving proposed project outcomes; and 4) assessment of WPIC's technical assistance approach. These findings will be used for the purpose of evaluating changes that have occurred since the baseline assessment, as well as identifying

areas for quality improvement and next steps in moving the project forward. A final evaluation assessment will be conducted at the end of the project.

Background

Considerable challenges exist in Alaska to providing child welfare services to Native children and families. Over 250 Alaska Native Villages are spread across a huge geographical area twice the size of Texas, many of which are accessible only by sea or air. Tribal communities are affected by unpredictable and often harsh weather conditions, and encompass diverse cultural and linguistic regions. They have limited formal child welfare client support services and often have been thought to have insufficient resources to deal with complex child welfare issues. Consequently, hundreds of Alaska Native children are removed to nearby urban communities and placed in non-Native care with a poor prognosis for reunification or family permanency outcomes.

Alaska's unique history of recent statehood and the troubled relationship between the state and the Alaska Native Tribes have made solutions to child welfare issues applied in other states difficult to apply in Alaska. The state of Alaska and the Tribal governments differ strongly in their legal opinions about the limits and scope of authority on a broad range of issues including Tribal sovereignty, and the state has been highly resistant towards Tribal efforts to assert jurisdictional authority over child

welfare cases. These conditions hinder compliance with the Indian Child Welfare Act (ICWA), contribute to the disproportionate placement of Alaska Native children, and inhibit the expansion of Tribal services, including access to federal resources that Tribes are eligible to receive. The 2006 settlement of the Alaska Supreme Court Curyung Decision, however, requires the Office of Children's Services (OCS) to engage in improved ICWA compliance practice. Thus, current policy conditions, coupled with growing awareness at both the state and federal level of the over-representation of Alaska Native children, have provided new and additional motivation for the state to improve collaboration with Tribes.

Federal requirements for the implementation project grants specified that Tribes must have current approved Title IV-B plans in order to apply. This is true for most grant opportunities and federal resources, which means that Tribes must go through the process of obtaining IV-B status to be eligible for many funding sources. In Alaska there are a total of 16 Tribal entities meeting this qualification, who jointly applied for the current implementation project. The majority of these Tribal partners are regional non-profits, although some, including the lead on the project (Tlingit & Haida) are federally recognized Tribes. Regional non-profits are Tribal entities, and are designated to be the providers of social and child welfare services in their regions by Tribal resolutions. Each individual Tribe has a specific resolution with their regional non-profit, which specifies

the authority of the non-profit and the extent to which there is a government-to-government relationship in place.

Ongoing efforts to address disproportionality, improve services for Alaska Native children and families, and increase Tribal-state collaboration were underway prior to the establishment of the current implementation project. The Alaska Tribal Title IV-B partners in collaboration with the State of Alaska Office of Children's Services have collectively participated in a number of efforts to improve child welfare practice under the Tribal/State Collaboration Group (TSCG). The TSCG has been in existence since 1994, and includes representatives from Tribes, Native communities, and the Office of Children's Services. The group was established to collaborate on issues pertaining to Alaska Native and American Indian families and youth, with a focus on strengthening ICWA compliance, promoting healthy racial and ethnic identity, and developing strong working relationships between the state and Tribal entities. The group is led by co-chairs consisting of three Tribal partners and three top-level state administrators from OCS. Additionally, two subgroups of the TSCG are key contributors on the implementation project: the Tribal Caucus and the Tribal Foster Care Licensing Committee.

Over the years, the TSCG has made significant efforts to strengthen the partnership between the state and Tribes and improve the child welfare system for Alaska Native and American Indian families.

The group has had a number of important successes, and continues to work together to address disproportionality. To date, the TSCG has established Tribal Title IV-E Agreements with the State of Alaska, developed and implemented a [illegible]man Services training curriculum, developed and implemented advanced ICWA training for state and Tribal child welfare workers, created ICWA Specialist positions in every region of OCS, collaborated on a number of different workshops and trainings addressing issues of racism, historical trauma, and reinforcing positive racial/ethnic identity, including "Knowing Who You Are" trainings in partnership with Casey Family Programs, worked to develop Tribally licensed foster care standards, and established the Alaska Native Family Preservation unit, which focuses on the use of in-home services with Native families. (For more information, visit the TSCG website: http://hss.state.ak.us/ocs/icwa/tscg/tscg.htm.)

The current project through WPIC builds upon the previous successes of TSCG and represents the most recent collaborative effort to reduce the disproportionality of Alaska Native children in the child welfare system. The baseline assessment (Johnson & Armstrong, 2011) identified five key themes arising during the first year of project implementation:

1) *Tribal-state relations*. Concerns have been expressed repeatedly over the historical relationship between Alaska Native Tribes and the state child welfare system. Historical trauma, oppression, issues around Tribal

sovereignty, and mutual distrust between Tribal and state agencies all represent significant challenges in efforts to create a cohesive child welfare system for Alaska Native children and families. However, stakeholders on both sides also expressed widespread desire for improved collaboration and relationship-building.

2) *Responsibility and accountability*. Both Tribal and state stakeholders identified a lack of shared accountability for child welfare outcomes, although they provided distinct perspectives on the matter. State stakeholders perceived a need for Tribes to take on more personal responsibility, however, Tribal partners emphasized that in order to do so, the state must relinquish some of its power.

3) *Resources*. This is a key issue, particularly with regard to the desire for increasing tribal child welfare services. Tribes have limited funds and generally have to compete with the state and with other Tribal needs for resources. Thus, specific concerns were raised over the availability of sufficient resources as well as the use and distribution of resources.

4) *Roles*. Throughout the first year, there was a continued need for role clarification among the various project partners and organizations. This was particularly true since there had been changes occurring in project membership, changes in leadership positions within OCS, Tribes, and WPIC, new individuals joining the project, and some role

changes among those involved. Efforts had been made to clarify roles, but confusion continued, making this an ongoing issue during the first year.

5) *Culture*. This represents a key component of the implementation project. Alaska Native children and families need services that are culturally-appropriate, and there is a great need for culturally-sensitive service providers. Tribes would like the state to recognize that allowing Tribal organizations to provide services would be better for Alaska Native children and families, and will lead to more positive long-term outcomes.

Through interviews with project stakeholders, numerous challenges and limitations to the current system capacity were acknowledged; however, several core strengths were also identified. Participants described a shared vision and commitment to the systems change effort among a core leadership group of both tribal and OCS partners, efforts to be inclusive of various stakeholder groups (i.e. OCS leadership and front-line workers, non-IV-B Tribes, the Court Improvement Project, etc.), the availability of child welfare data through OCS, and a strong commitment to improving Tribal-State collaboration as key strengths that will support the implementation and sustainability of the project. Challenges, on the other hand, included lack of shared authority and accountability across OCS and the Tribes, differences in values between the Tribes and OCS, current practices and policies that are not culturally-sensitive or

aligned with the core project values, limited engagement of parents and youth in the project, a need for more consistent sharing and use of data, insufficient Tribal resources, and lack of a truly collaborative relationship between OCS and the Tribes, which was characterized by an overall failure to recognize Tribal sovereignty, outdated interagency agreements, and little sharing of resources. With regard to the technical assistance provided by WPIC, respondents felt that WPIC had been most helpful in the following areas: clarifying system change goals, facilitating a process of reconciliation and relationship-building between the State and Tribes, sharing various service models with project partners, providing peer learning opportunities (e.g. with Hawaii), and forming project workgroups with Tribal and State co-chairs. Challenges with WPIC's TA approach included lack of clarity about various WPIC partner roles, maintaining momentum in between on-site project meetings, and lack of a clear strategic plan to identify next steps and guide the project in moving forward.

* * *

III. Project Implementation

The Alaska project has been designed to implement an array of policy and practice changes to create a continuum of culturally-responsive services for Alaska Native children and families. A series of implementation goals have been established at the system, program/policy, and practice levels, which focus on the creation, implementation, and consistent

application of a State-Tribal bi-lateral differential response model. To carry out the various implementation tasks, several workgroups were established, with each taking responsibility for a different component of the project. These workgroups are as follows: the Linkages Workgroup, whose mission is to determine, design, and implement the OCS infrastructure needed for using Tribal in-home services as the preferred alternative to out-of-home placement; the Tribal In-Home Capacity Workgroup, whose mission is to assist each Tribe in designing, articulating, and implementing a self-determined in-home service model; the In-Home Services Program Design Workgroup, whose mission is to demonstrate a bi-lateral approach to in-home services in five sites through redesign of the Rural Social Service Grants; the Social Marketing Workgroup, whose mission is to influence the behavior of leaders and stakeholders positively to support elements of system change; and the Tribal Foster Care Workgroup, whose mission is to develop an implementation process that includes policies and procedures to effectively administer a Tribal foster care program. The In-Home Services Program Design group successfully completed their tasks by January 2012, and in its place two new workgroups were formed: the Tribal In-Home Implementation Workgroup, consisting of the five RSS grantee Tribes with the goal of addressing the skill sets needed to implement Tribal in-home service systems of care in collaboration with the State; and the Tribal In-Home Planning Workgroup, made up of the non-RSS grantee Tribes with a focus on funding in-home services

through reconfiguration of existing funds and developing or expanding capacity to develop in-home service systems of care. Information about progress towards implementation of each project goal and specific tasks and activities that have been completed is provided in the following sections.

System Level

1. *Promote positive State and Tribal collaborative relations*

Efforts to address this goal have been underway and ongoing from the beginning of project implementation, and will continue for the duration of the project. WPIC has worked with the pre-existing TSCG structure to improve upon the current Tribal-State relationship. Training and technical assistance provision have focused on building better communication processes and mechanisms, reconciling the lasting impact of racism and historical trauma, and teaching the use of collaborative problem-solving skills among a diverse group of partners. Workgroups have been structured with Tribal and State co-leads to further build and encourage collaborative relationships and leadership. Specific activities that have been completed to support Tribal-State collaborative leadership include:

- Training in *Truth and Reconciliation* and *Decolonizing Child Welfare*
- Facilitation of *Courageous Conversations*

- Leadership Summit – training and capacity building around collaborative problem-solving skills

2. *Enhance collaboration with State and Tribal courts*

Implementation work is just beginning to address this goal during the third year of project implementation. The Tribal Capacity Self-Assessment, completed during the second implementation year, identified a strong need for capacity building among Tribal child welfare case managers in the area of court skills, such as presenting in court and writing court reports. Additionally, WPIC has identified issues with the inclusion of Tribes in the court system: case decisions are made without the presence or participation of Tribal program staff. However, one indication that the State has recognized the issue and the need to work towards collaboration with Tribes, the Court Improvement Project has recently included Tribal representatives on an advisory board. Training and technical assistance to further improve collaboration with the courts has been scheduled for an August 2012 training institute, at which the NRC for Legal and Judicial Issues will be providing training for Tribal workers on participating in court hearings, presenting the Tribe's position on a case, acting as a witness, working with GALs, CASAs, and public defenders, and writing court reports. Judges and other court staff are also being invited to this event to

address their training and coaching needs for how to collaborate with Tribal programs.

3. *Establish sustainable policies, procedures, and protocols necessary to maintain State-Tribal bi-lateral family-centered differential response*

The Alaska Safety Assessment Model serves as the protocol for differential response. This is an OCS practice model that includes policies and procedures for assessing child risk and safety factors and determining the appropriateness of providing in-home services as an alternative to out-of-home placement. Under this model, Tribal in-home services have been articulated as the preferred alternative response for Alaska Native children and families, and a referral process has been established. A new Protective Capacity Assessment has also recently been developed as a protocol under this model, although this protocol is currently on hold. The Alaska Safety Assessment Model is implemented as official OCS policy and procedure, although practice issues still need to be addressed. Tribes are currently in the process of articulating their in-home service models, including policies and procedures for provision of in-home services, with safety at the core of the model. Additionally, as noted earlier in the report, all OCS policies are currently under review as a result of the Tanana decision, although any revisions to the model would presumably provide further support for the use of Tribal services.

Program and Policy Level

1. *Build Tribal and State capacity to work collaboratively to meet child and family safety needs and avoid unnecessary placements*

The Alaska Safety Assessment Model provides a foundation for Tribal-State collaboration to ensure child and family safety through a culturally-responsive service system. WPIC liaisons have been providing consultation on-site with the Tribes individually on how to incorporate the model into their in-home service designs. A protocol for OCS referrals to tribal in-home services has been developed, and the Linkages workgroup is currently working on creating a resource directory of Tribal in-home services. The group has identified and created a matrix of in-home services currently being offered by Tribes and barriers to service provision. Overall, the policies to support Tribal-State collaboration are in place, with the majority of challenges arising at the local level around the lack of buy-in from front-line staff. Partners have agreed that the project needs to move towards addressing collaboration locally.

2. *Build Tribal capacity to deliver effective child welfare services*

The Tribal Capacity Self-Assessment, completed during the second implementation year, identified the current capacities of Tribal programs and their interest in taking on greater child welfare roles and responsibilities. One area identified for capacity

building was the provision of foster care. Many Tribes lacked written policies for foster care, and most reported that they do not have an active foster care licensing program. The Tribal Foster Care Workgroup was established to address these capacity issues. The workgroup was successful in developing a set of standards, forms, policies, and procedures for providing Tribally-licensed foster care, which are in accordance with all federal guidelines. These standards are currently under review by OCS.

The assessment also indicated that Tribes were at varying levels of capacity to provide in-home services; some Tribes had developed written policies and procedures, some had articulated understandings verbally but not in writing, and some had no infrastructure for in-home services. All Tribes, however, indicated some need to further refine their policies and procedures. Agreement was reached among the project partners to use the five RSS grantee Tribes as pilot sites for the implementation of Tribal in-home services, due to their more developed infrastructures and availability of funds. The In-Home Services Program Design Workgroup redesigned the RSS grants for this purpose, and implementation work is now focused on the development of individually-tailored in-home service models for each Tribe. WPIC partners helped to develop an in-home services planning template to facilitate this process. The template includes the Alaska Safety Assessment Model as the core around which Tribal in-home services are provided, and weaves together OCS guiding principles

for safety with the Tribe's own definition of a safe child as the foundation for the provision of in-home services. WPIC liaisons have been providing on-site training and consultation individually to the Tribes on the use of the template for the development of their own individualized models. Additionally, the NRC for In-Home Services has provided on-site training on the elements of effective service models, and in conjunction with WPIC has also been providing technical assistance to the Tribes in developing their individual service models. To identify further training needs, the Tribal In-Home Capacity Workgroup developed an in-home service training needs survey, which was administered in the Fall of 2011. Development of the individualized service models, including quality assurance mechanisms, is still in process, although two Tribes have recently completed drafts. A challenge in this process is that each Tribe must get their model approved by their Tribal leaders or council before they can implement it.

* * *

VI. Summary and Conclusions

Both the successes and challenges described throughout this report have been important for the personal growth of project partners, as well as broader system growth. Through their experiences working together, partners identified two overarching lessons learned about implementing systems change. First, that building relationships is critical to achieving success. Partners have come to recognize the importance

of establishing and strengthening positive collaborative relationships across organizations:

> "The relationship is key, both building and sustaining."
>
> "Building trust is critical before any change can happen."

Only after engaging in an intensive process of recognizing and reconciling the traumas that have been inflicted in the past and engaging in open and honest dialog together have Tribal and State partners been able to move the project forward as a collaborative effort. The commitment to a shared set of systems change goals and greater trust in one another has helped the partners to achieve successes where they had previously made little progress. The second lesson learned, however, is that change is difficult and takes a long time. As one partner described, it is, "much more painfully slow than I thought it would be." Another added that it is, "harder than it sounds, [and] takes much longer than you think." Creating meaningful and sustainable systems change does not happen overnight; it takes time, effort, and dedication. This can be frustrating for those working to implement change, as evidenced in the stakeholder comments shared here and in previous sections of the report, however, this is another reason why the ongoing commitment and collaboration across partners is so important.

This report has provided a comprehensive, midpoint assessment of the Alaska implementation

project, with analysis centered around four key evaluation components: 1) capacity to implement systems change; 2) implementation of proposed system changes; 3) progress towards achieving desired project outcomes; and 4) assessment of WPIC's technical assistance approach. The findings described in the previous sections suggest significant changes and progress have occurred since the baseline assessment. Project stakeholders perceive considerable increases in their capacity to implement systems changes, and report noticeable improvements in Tribal-State collaboration at the leadership level. Great strides have also been made in the implementation process: Tribally-licensed foster care standards have been completed and submitted to OCS for review, and several Tribes have either completed or nearly completed drafts of their in-home service models. These are immense achievements for the project partners that demonstrate their commitment to systems change.

The accomplishments of the project to date are very encouraging, but the report also highlights the considerable amount of work remaining. Support and buy-in for the systems change effort has not yet penetrated down to the local level, where there is still considerable resistance towards Tribal services. At the higher political level, although there have been gains in support for the general project goals, concerns remain about the extent to which there is genuine support for Tribal sovereignty, and the Tribes continue to struggle with how to implement and sustain Tribal services without access to the funding

and resources that are available to the State. With just over a year left on the implementation grant from the Children's Bureau, furthermore, there are concerns about the fact that the Tribes have not finished developing their service models, leaving little time to actually implement them into practice. The pace at which implementation has progressed leaves questions as to how much can be accomplished in the remaining time, and whether any changes in child and family outcomes will be evident at the end of the project.

Recommendations

- Based on the findings described in this report, the following recommendations are proposed as next steps for moving the project forward:
- Build and strengthen community support and buy-in for the systems change goals at the local level, particularly commitment to collaboration with Tribal programs among regional OCS staff.
- Work with OCS to review/revise/adapt policies and procedures including the new Tribal foster care licensing standards to ensure they are in alignment with the systems change goals and recognize Tribal jurisdiction as required by the Tanana court decision, and identify areas where practice changes need to occur to bring into alignment.

- Address cultural competency of OCS workers at the local level through training and coaching.
- Intensify work with the Tribes to complete the in-home service models and begin implementation, including development of quality assurance processes.
- Revise reporting procedures for Tribal in-home service programs to better capture the work that is happening and the impact that in-home services have on children and families.
- Identify additional training and technical assistance resources that could help to sustain the system changes after the implementation grant ends.
- Continue to refine and add to the disproportionality data indicators, especially in the area of child safety.

* * *

Data Dashboard Workgroup Status Update

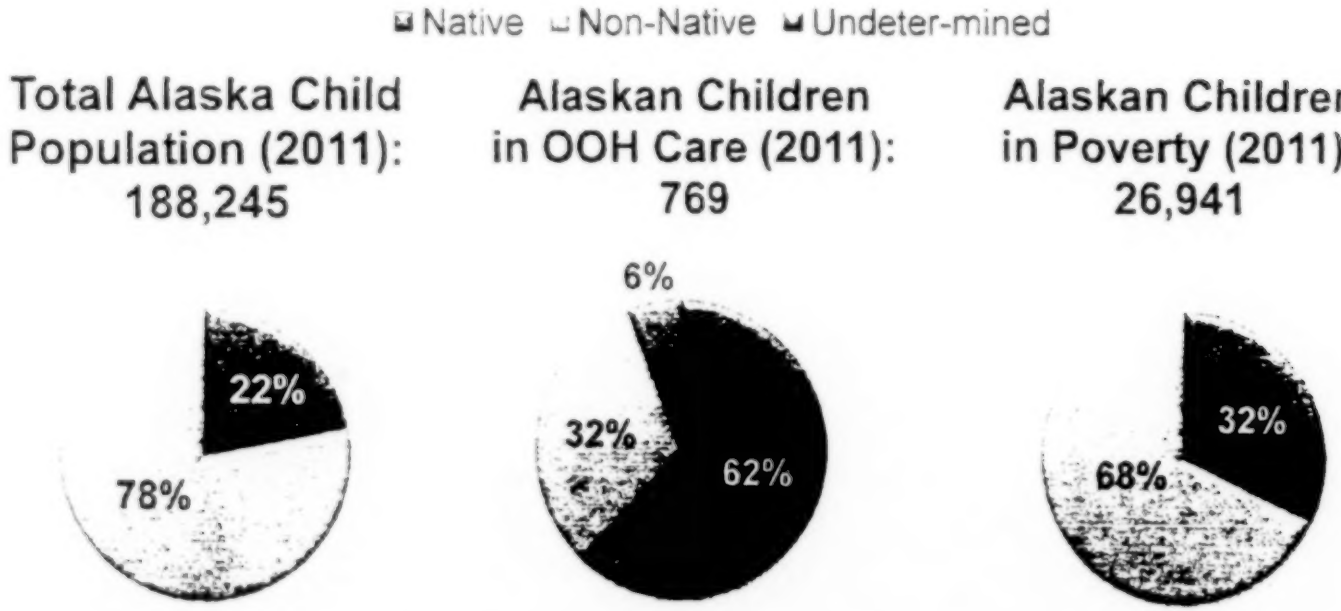
Alaska Child Welfare
Disproportionality Reduction Project
February 2013 Meeting

Western and Pacific Child Welfare Implementation Center
A Service of the Children's Bureau
A Member of the Training and Technical Assistance Network

Defining Disproportionality

Western and Pacific Child Welfare Implementation Center
A Service of the Children's Bureau
A Member of the Training and Technical Assistance Network

- The overrepresentation of Alaska Native children in the child welfare system when compared with their representation in the general population



Disproportionality at Key Points in the Alaska Child Welfare System

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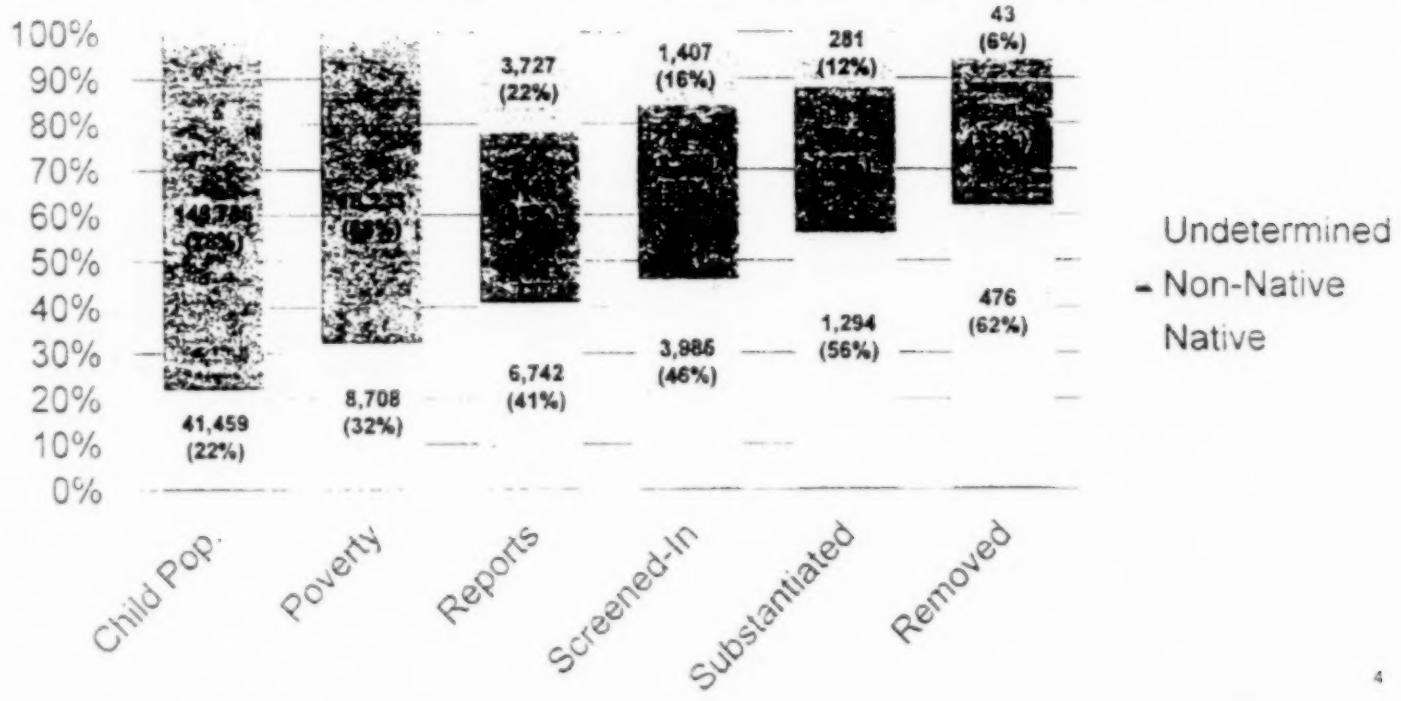
Disproportionality of Alaska Native Children (2011)



Discharge Data for Alaska Native Children (2011)

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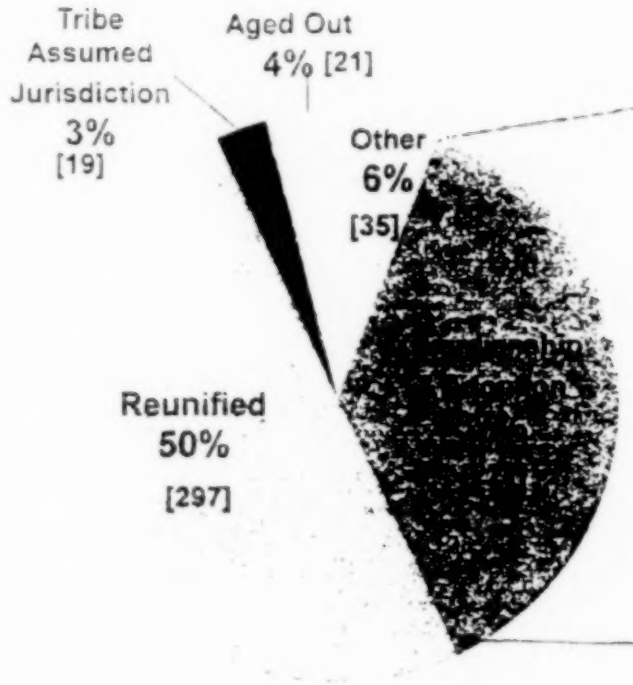
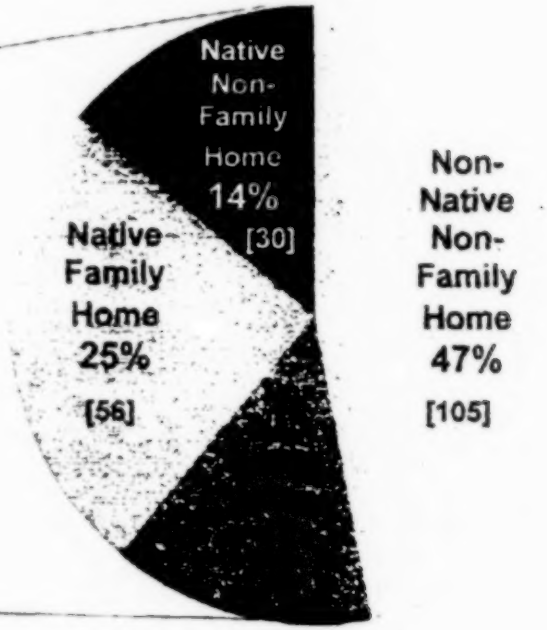
Native Children Discharged



Relation to Adoption/ Guardianship Family



Anchorage Region (2011)

Western and Pacific Child Welfare Implementation Center
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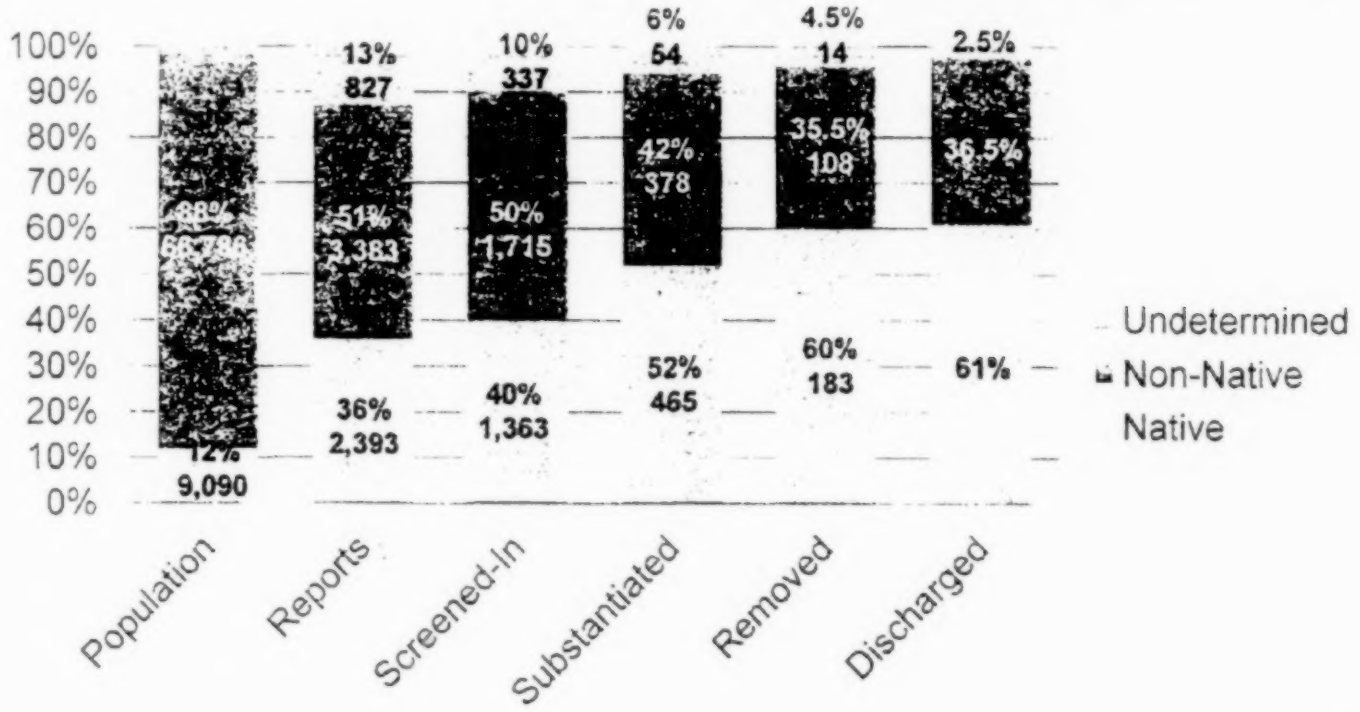

AMICUS CURIAE BRIEF

No. 12-399

SUPREME COURT, U.S.
FILED
MAR 28 2013
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ADOPTIVE COUPLE,

Petitioners,

v.

BABY GIRL, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF WISCONSIN TRIBES AS AMICI CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether 25 U.S.C. § 1915(a), which provides that in "*any* adoptive placement" of an "Indian child," preference "*shall* be given" to members of the child's extended family or other Indian families, can be rewritten to apply only to placements of children who were previously in the custody of their Indian biological parent.

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the eleven federally recognized Indian tribes located within the State of Wisconsin. They file this brief to describe the interests they have in protecting their tribal-citizen-children through enforcement of the Indian Child Welfare Act ("ICWA").

SUMMARY OF ARGUMENT

Petitioners admit that this is an involuntary proceeding under 25 U.S.C. § 1912 of the ICWA, in which they are seeking termination of the biological father's parental rights. Reading certain phrases of the ICWA in isolation, the Petitioners claim that the protections of Section 1912 extend only to custodial parents. In doing so, they raise the so-called "existing Indian family" doctrine, which claims that the ICWA only applies in cases where the Indian child has previously been raised in an Indian home. This doctrine has already been rejected by the vast majority of state courts and legislatures, including the court that was responsible for its initial development. *See, e.g.*, *In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

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[1] The parties have given blanket consents that permit the filing of amicus briefs in this case. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amici and its counsel contributed monetarily to the preparation or submission of this brief.

In crafting their arguments, the Petitioners have attempted to disguise the fact that even if the biological father has no rights in this case,[2] the ICWA still precludes them from adopting Baby Girl. Congress recognized that Indian tribes have an interest in child custody proceedings that is distinct from and on parity with the interests of biological and adoptive parents. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49 (1989). During the debates on the ICWA, Congress was presented with statistics demonstrating that up to 40 percent of all Indian children in the State of Wisconsin were being raised in non-Indian homes and institutions. *Indian Child Welfare Program: Hearings on Problems that American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction Before the Subcomm. on Indian Affairs or the Senate Comm. on Interior and Insular Affairs*, 93rd Cong. 172 (1974) [hereinafter 1974 Senate Hearings]. In passing the ICWA, Congress recognized that the federal government has a trust responsibility that includes "the protection and preservation of Indian tribes and their resources." 25 U.S.C. § 1901(2). This trust responsibility must extend to Indian children, because "there is no resource that is more vital to the continued existence and

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[2] Amici do not agree with the arguments raised by Petitioners seeking to limit the rights of biological fathers under the ICWA. Those issues, however, have been adequately covered in the Respondents' merits briefing. They are not addressed in this brief, which focuses on the distinct rights of Indian tribes.

integrity of Indian tribes than their children." 25 U.S.C. § 1901(3).

One of the ways that Congress chose to fulfill its trust responsibility to Indian tribes through the ICWA was to require that *all* adoptive placements of Indian children be governed by the placement preferences in 25 U.S.C. § 1915. Indian children must be placed with their extended family, a member of the Indian child's tribe, or another Indian family unless "good cause" exists. This provision was designed to ensure that extended family members and Indian families are always the first priority when selecting adoptive families for Indian children.

In Part I of this brief, the amici explain that the "exception" sought by the Petitioners would eviscerate the statute and prevent the achievement of Congress' goals. Despite significant recent improvement, the State of Wisconsin currently complies with the ICWA's notice and placement preferences in less than 30 percent of its involuntary child protection proceedings. Applying the "existing Indian family" doctrine within the State could eliminate the statute's application to one-half of all current ICWA cases. Nearly all private adoptions in the United States involve unwed mothers who voluntarily relinquish their children immediately after birth, just as the biological mother did in this case. It could be argued that none of these children have been part of an "existing Indian family," meaning that the ICWA would not apply. This result clearly contravenes Congress' intent.

The amici are small tribes. Only a small portion of their members reside within reservation boundaries, where the tribe can exercise exclusive jurisdiction over child protection proceedings. If this Court creates an "existing Indian family" exception to the adoptive placement preferences found in 25 U.S.C. § 1915(a), it would threaten the amici's very existence.

The Petitioners suggest that the legislative history of the ICWA supports their assertion that Section 1915(a) should be limited by the "existing Indian family" doctrine. As the amici explain in Part II of this brief, it does not. The Senate took up the ICWA first, and the bill that it passed would have created an "existing Indian family" exception. For certain provisions of the Act to apply, the Senate bill would have required that the Indian child either be a resident of the reservation, or have "significant contacts with an Indian tribe."

When the House considered the ICWA it deleted any requirement that an Indian child must have "significant contacts with an Indian tribe." The House also rejected suggestions by the Department of Justice ("DOJ") and the Department of the Interior ("DOI") that would have limited the definition of "Indian child" to those children who were in the legal custody of their biological Indian parent. The House version of the bill prevailed in the conference committee. The legislative history thus demonstrates that Congress specifically rejected any "existing Indian family" doctrine when passing the final version of the ICWA.

Petitioners claim that Congress could not have "plausibly intended" this result, because it would require birth mothers to "go searching for Indian adults to adopt their child." The ICWA does not require this. If the birth mother was unable to choose an Indian family that met the placement preferences she could have simply requested that the Cherokee Nation do so. As Part III of this brief explains, there are a plethora of Indian families who would have been happy to adopt Baby Girl; not surprisingly, the demand for healthy infants in the United States greatly exceeds the supply. In any event, the birth mother did "go searching" for a couple to adopt her daughter by hiring a private adoption agency and selecting the Petitioners from a number of adoptive families. The adoption agency should have presented the birth mother with families that met the preference criteria.

This Court should not deviate from the plain language that Congress carefully crafted. That language requires that the adoptive placement preferences "*shall* be given" in "*any* adoptive placement of an Indian child." 25 U.S.C. § 1915(a). This is "[t]he most important substantive requirement imposed on state courts" by the ICWA. *Holyfield*, 490 U.S. at 36.

ARGUMENT

I. AGGRESSIVE ENFORCEMENT OF THE ICWA IS NECESSARY FOR THE CONTINUING EXISTENCE OF THE AMICI

Prior to 1978, Wisconsin tribes suffered under federal and state practices that encouraged the removal of Indian children from their families and tribes. While the ICWA sought to reverse these practices and protect the interests of Indian tribes, Indian children and their parents, its application in the State of Wisconsin has lagged behind its promise. For example, between 2005 and 2007, Indian tribes were provided notice in fewer than 18 percent of involuntary foster care and termination of parental rights proceedings. Likewise, the placement preferences contained in 25 U.S.C. § 1915 were followed in only 11 percent of ICWA cases.

Recently, however, there has been reason for hope. After receiving these statistics, the tribes and the State spent several years working out the details of State legislation to rectify implementation deficiencies. In 2009, the legislature unanimously passed the Wisconsin Indian Child Welfare Act ("WICWA"). This Act codified the ICWA into state law. In doing so, it explicitly rejected the so-called "existing Indian family" doctrine. The Act also acknowledged that the "best interests" of Indian children were considered by Congress, and placing Indian children with either their extended family or in Indian adoptive homes furthered those interests.

Extensive training of social workers, attorneys, and judges has been occurring since the passage of the WICWA. The State's compliance percentage has nearly doubled over the past year, but there is still a long way to go before the promise of the ICWA is achieved. This section illustrates why there is a continuing need for aggressive enforcement of the ICWA, and why the "existing Indian family" doctrine, which has already been repudiated by the vast majority of states, would compromise the recent progress made in Wisconsin.

A. Wisconsin Statistics from the ICWA's Legislative History

When Congress was considering passage of the ICWA, it reviewed a study completed at its behest by the Association on American Indian Affairs. *E.g.*, *Indian Child Welfare Act: Hearing on S. 1214 Before the Select Comm. on Indian Affairs*, 95th Cong. 537-603 (1977) [hereinafter 1977 Senate Hearing]. That study compiled data on child protection proceedings in 19 different states, including Wisconsin. *Id.* at 539. The results were shocking.

In 1970, there were 10,176 Indian persons under 21 years of age living in the State of Wisconsin. *Id.* at 600. One out of every 13.9 of those children was adopted by a non-relative. This was almost 18 times the rate of non-Indian adoptions in the State during the same time period. Tragically, 69 percent of these Wisconsin Indian children were less than one-year old

when they were adopted. *Id.* Since nearly all of these children were placed in non-Indian homes, they were never able to learn about their tribe's culture or traditions. *See* 1974 Senate Hearings at 5 (approximately 85 percent of all Indian children in out-of-home placements were living in white adoptive or foster homes).

Indian children were also disproportionately represented in the foster care system. In March 1973, there were 545 Indian children in foster care in Wisconsin. *Id.* at 600. This represented one out of every 18.7 Indian children. By comparison, one out of every 250 non-Indian children were in foster care during the same time period. *Id.* Combining foster care and adoptive placements, the study concluded that one out of every eight Indian children in Wisconsin were in out-of-home care. *Id.* at 601; *Indian Child Welfare Act: Hearings on S. 1214 Before the Subcomm. on Indian Affairs and Pub. Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 269 (1978) [hereinafter 1978 House Hearings].

As terrible as these statistics are, they do not even provide a complete picture of the problem. Adoptions facilitated by private agencies were not included in the study completed by the Association on American Indian Affairs, because no reliable figures were available at the time. 1977 Senate Hearing at 601. Testimony indicated, however, that when private adoptions and juvenile incarcerations were added to the State's out-of-home placement figures, nearly 40 percent of all Indian children in Wisconsin were in

non-Indian homes or institutions. 1974 Senate Hearings at 172.

The statistical evidence from Wisconsin and other states helped Congress realize the seriousness of the problem. "Indian tribes and Indian people [were] being drained of their children and, as a result, their future as a tribe and a people [was] being placed in jeopardy." 124 Cong. Rec. 38,102 (1978). *See also* 1974 Senate Hearings at 70 (testimony of attorney who noted that his client "was concerned that if many more of their children were taken . . . [the tribe's] very survival would be at stake"). The absence of Indian children threatened Indian tribes' abilities to perpetuate their cultures and traditions. 1978 House Hearings at 193; 1974 Senate Hearings at 122; 123 Cong. Rec. 21,043-44 (1977). Additionally, the very core of tribal sovereignty and self-determination was jeopardized by the wholesale displacement of Indian children. For tribes to remain separate, fully functioning sovereigns, they must have enough citizens willing and able to serve in tribal governmental positions, including legislative, executive, and judicial branches. 1978 House Hearings at 193; 124 Cong. Rec. 38,103 (1978). For these and other reasons, Congress passed the ICWA to keep Indian children in Indian families.

B. Problems with Implementation of the ICWA in Wisconsin

While progress was made as a result of ICWA's enactment, it has been slower than expected. In 2005,

three and one-half percent of Wisconsin's foster care population was Indian, even though Indian children represented only one percent of the total number of children within the State. *See, e.g.*, Wisconsin State Senate and Assembly Joint Hearing on ICWA Codification LRB 0150/3 (Sept. 16, 2009) (testimony of Mark Tilden on behalf of the National Indian Child Welfare Association). Studies completed and statistics compiled between 2004 and 2009 prove that the State rarely notified Indian tribes of involuntary child placement proceedings as required by 25 U.S.C. § 1912(a), and often failed to abide by the placement preferences contained in 25 U.S.C. § 1915(a) and (b).

One such study was completed by the U.S. Department of Health and Human Services ("HHS"). The HHS is authorized to review state child and family service programs to ensure that they comply with federal child welfare requirements, including the ICWA. These Child and Family Services Reviews ("CFSRs") consist of two parts: a statewide assessment, and an on-site review of service outcomes and program systems. States who have not achieved substantial conformity with federal law in the areas assessed are required to develop and implement Program Improvement Plans to address the areas needing improvement. *See, e.g.*, HHS, Children's Bureau, *Child and Family Services Reviews Fact Sheet*, *available at* http://www.acf.hhs.gov/sites/default/files/cb/cfsr_factsheet.pdf.

In 2003, the HHS conducted a CFSR for the State of Wisconsin. In its Final Report, the Department

concluded that the State was deficient in (1) identifying Indian children, and (2) providing Indian tribes with timely notice of involuntary foster care and termination of parental rights cases. *See* HHS, Final Report, Wisconsin Child and Family Services Review 42, 61, 66 (Jan. 13, 2004). State officials admitted that "adherence to ICWA provisions is not occurring consistently across the state." *Id.* at 42.

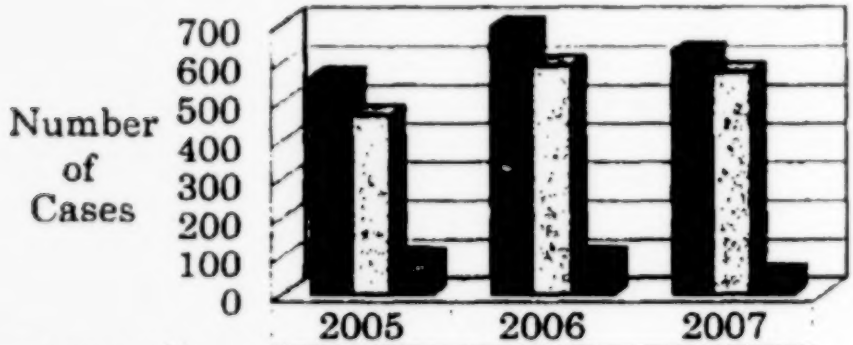
While the Wisconsin CFSR's findings were disconcerting, the sample size used to determine compliance with the ICWA was extremely small, and therefore, it was impossible to know whether the problems identified in the study were widespread. Fortunately, the Wisconsin Supreme Court began its own survey of ICWA cases as part of its Children's Court Improvement Project. Court employees reviewed the files of 92 child protection cases where the ICWA was applicable. The Court's survey indicated that notice of involuntary child custody proceedings was only provided to Indian tribes in 18 percent of the cases. Only 28 percent of the case files contained documentation demonstrating that an "active efforts" finding had been made either orally or in writing prior to terminating parental rights, as required by 25 U.S.C. § 1912(d). Finally, a qualified expert witness presented testimony in only 42 percent of the cases studied where parental rights were terminated, even though 25 U.S.C. § 1912(f) requires such testimony in all cases.

These studies prompted the Wisconsin Department of Children and Families to use its own database

– the Wisconsin Statewide Automated Child Welfare Information System ("eWiSACWIS") – to determine the agency's compliance with the ICWA in involuntary child custody proceedings. Some of the eWiSACWIS data generated through that search is included in the chart below:

Wisconsin ICWA Compliance

(2005–2007 Annual Statistics)



	2005	2006	2007
■ICWA Cases	567	695	631
□No Notice	468	594	577
□Notice Sent	99	101	54
Compliance	17.4%	14.5%	8.6%

This eWiSACWIS data confirmed the results of the CFSR and Wisconsin Supreme Court studies: the State was not providing notice to Indian tribes as required by the ICWA. The State's compliance with the placement preferences of the Act was even worse. Between 2005 and 2007, out of 1,893 cases subject to the ICWA, the placement preferences contained in

25 U.S.C. § 1915 were followed in just 207 cases, or 11 percent of the time.[3]

Wisconsin was also struggling with the applicability of the "existing Indian family" doctrine. While Wisconsin appellate courts had never decided whether the doctrine was consistent with the text and legislative history of the ICWA, they seemed to imply that they might be amenable to such arguments. *See, e.g.*, *In re Shawnda G.*, 634 N.W.2d 140, 143 n.5 (Wis. Ct. App. 2001); *In re the Termination of Parental Rights to Branden F.*, 695 N.W.2d 905, ¶ 14, n.3 (Wis. Ct. App. 2005).

Perhaps encouraged by dicta in these appellate decisions, some State trial judges were applying the "existing Indian family" doctrine in their own unpublished opinions. At times, the issue was raised *sua sponte* by a judge, but then abandoned when the county attorney refused to advocate for the doctrine.[4]

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[3] These statistics are taken from the legislative history of the WICWA, which is discussed in Section I(C) *infra*.

[4] For example, the "existing Indian family" doctrine was raised in a termination of parental rights case in Dane County, Wisconsin. The birth father was a citizen of the Lac Courte Oreilles Band, but he had not had any contact with the child after his birth. Judge Diane Nicks called for supplemental briefing addressing the applicability of the "existing Indian family" doctrine. When the tribe, the father's attorney, the county attorney, and the guardian ad litem all excoriated the doctrine, the Judge abandoned her position. With the permission of the tribe, the child was ultimately adopted to a non-Indian couple. The adoptive couple entered into agreements with the tribe that

(Continued on following page)

Other times, the doctrine was raised by private parties and used with devastating effect. One such case began in Brown County, Wisconsin, in 1985.

A non-Indian single mother sought to have her school-aged daughter, K.S.M., adopted by a Caucasian couple that she had identified with the help of Pauquette Children's Services, a private adoption agency. K.S.M. was eligible for citizenship in the Red Cliff Band, where her biological father was a citizen. At the time of the adoption proceedings, however, her father was in prison and had not contacted K.S.M. for several years. When the Red Cliff Band was provided notice of the termination of parental rights proceeding, K.S.M.'s paternal grandmother and uncle stepped forward as potential adoptive parents. Despite the preference provisions in 25 U.S.C. § 1915, which favored placement with the child's extended family, the Brown County Circuit Court approved K.S.M.'s preadoptive placement with the Caucasian couple identified by the birth mother. *In re K.S.M.*, 85JV-204 (Apr. 15, 1986).

In doing so, the Circuit Court applied the so-called "existing Indian family" doctrine, although it did not use that phrase. It noted that there was no Indian custodian involved in the proceedings since the biological mother was non-Indian and the biological

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ensured the child's connections with both his culture and his extended family would be maintained.

father had abandoned K.S.M. The court's order went on to state as follows:

> To place this child on a tribal reservation in a completely strange and foreign environment would destroy her. If the law required placement in an Indian environment, the Court would refuse to terminate [parental rights] because it would be contrary to the best interest of the child. This position of the Court is not meant to be interpreted as having any prejudice against the Native American. . . . [W.G.] impressed the Court that he is willing to take custody of [K.S.M.]. He is capable of providing an adequate home for a child with a Native American background, but it simply wouldn't work for [K.S.M.]. [K.S.M.] is not on the Tribal roll, has never lived on a reservation and could not handle the trauma of such a drastic and depressing change in her life.

Id. at 3. This judge's prejudicial belief – that living on a reservation is "drastic and depressing" – led him to use the "existing Indian family" doctrine to claim that the ICWA was inapplicable. Only then could the Caucasian couple be considered a placement that was in the child's "best interests," even though members of her extended family wished to adopt her.

This case was truly a contemporary ICWA horror story. The adoption was never finalized because K.S.M. was later sexually abused by the Caucasian adoptive father. She was then removed and placed with yet

another non-Indian adoptive family by Pauquette Children's Services. This time, no notice was provided to the birth mother, the Red Cliff Band, or K.S.M.'s extended family. They did not discover what had happened until after K.S.M. had been in the new placement for several years. This is just one example of how destructive the "existing Indian family" doctrine was in Wisconsin prior to its abolition.

C. Wisconsin's Codification of the ICWA into State Law

To its credit, the State of Wisconsin was concerned about its ICWA compliance record when these statistics and stories surfaced. At the request of the amici tribes, the State began considering codifying the ICWA into State law. State officials are, of course, required to comply with federal laws even in the absence of corresponding state legislation. But state law is typically the first place that social workers and judges turn to when making decisions in child protection cases. Including the ICWA in State law, and showing how the ICWA would interact with other State laws in the area of child protection, was considered by all stakeholders to be a crucial step towards increasing compliance with the federal mandates.[5]

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[5] Most federal child welfare mandates have been codified in State law to ensure compliance. *See, e.g.*, The Adoption and Safe Families Act, Wis. Stat. §§ 48.31(5), 48.335(3j), 48.427(5), 48.427(6)(b)(4); The Child Abuse Prevention and Treatment Act, Wis. Stat. § 48.981(3)(bm).

The Wisconsin Department of Children and Families formed an ICWA Codification Workgroup with the amici Wisconsin tribes. Over a four-year period beginning in 2005, the workgroup conducted extensive research on the ICWA, including reviewing the text of the Act, its legislative history, and case law from Wisconsin and other state courts. In 2007, the workgroup sent a proposed draft bill to stakeholders (*e.g.*, county social services, district attorneys, judges) for initial review and comment. A consensus in favor of codification was formed.

In 2009, seven negotiation meetings were held between legislators and key stakeholders. After these meetings and two public hearings, Senator Robert Jauch and Representative Ann Hraychuck introduced a revised bill to codify the ICWA into State law, primarily in Chapters 48 (the Children's Code) and 938 (the Juvenile Justice Code). The bill received a *unanimous* vote in the Assembly and Senate committees, and went on to receive a *unanimous* vote on the floor of the Senate and Assembly. The WICWA was signed into law by Governor Doyle on December 7, 2009.

Importantly, the WICWA addresses each of the questions presented to the U.S. Supreme Court in these proceedings. After reviewing the text and legislative history for the federal statute, as well as court decisions from sister states, the State of Wisconsin concluded that the federal ICWA precluded use of the judicially created "existing Indian family" doctrine. The WICWA explicitly precludes that doctrine's

use within the State. Wis. Stat. § 48.028(3) ("A court . . . may not determine whether this section and the [ICWA], apply to an Indian child custody proceeding based on whether the Indian child is part of an existing Indian family."). The WICWA also acknowledges that the "best interests" of an Indian child was considered by Congress in enacting the ICWA, and that the statute is meant to serve those interests. Wis. Stat. § 48.01(2). One of the ways the ICWA and WICWA ensure the best interests of Indian children is through the adherence to statutory placement preferences for Indian children in out-of-home care. These placement preferences are mandatory unless the court finds "good cause" to depart from them. Wis. Stat. § 48.028(e).

Only three years have passed since the WICWA was enacted in Wisconsin. Despite this short time period, improvements can already be seen. The Midwest Child Welfare Implementation Center of the University of Nebraska-Lincoln provided a grant which allowed an extensive training and technical assistance plan to be developed. To date, the training has reached over 1,000 child welfare workers in the State of Wisconsin. By September 2013, the State projects that its training will have also reached 400 attorneys and judges.

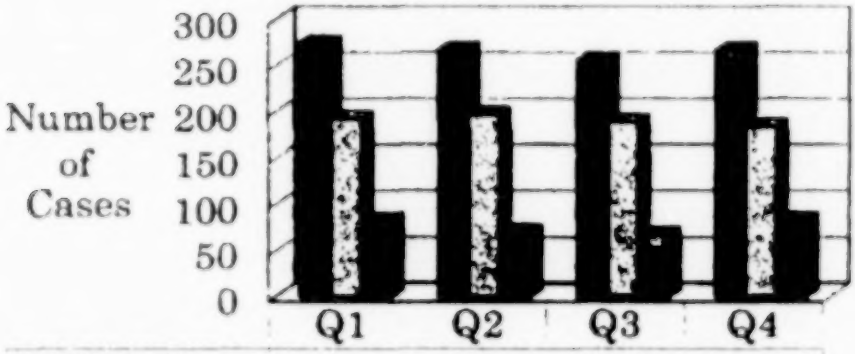
In addition to increased training on the requirements of the ICWA and WICWA, the State updated its eWiSACWIS computer system used to track child welfare cases. An ICWA tab was created to track these cases and ensure that data can be easily generated to

track compliance and to identify problem areas. The eWiSACWIS system also includes templates for key ICWA documents, such as the notice required to be provided to Indian tribes under 25 U.S.C. § 1912(a).

Compliance with key ICWA provisions has increased since the adoption of the WICWA. The chart below shows 2012 Wisconsin compliance figures for one key provision: the requirement that notice be provided to Indian tribes in involuntary foster care and termination of parental rights proceedings:

Wisconsin ICWA Compliance

(2012 Quarterly Statistics)



	Q1	Q2	Q3	Q4
■ICWA Cases	275	267	256	267
□No Notice	193	197	189	184
■Notice Sent	82	70	67	83
Compliance	29.8%	26.2%	26.2%	31.1%

As this chart illustrates, there is still substantial progress to be made. At best, Indian tribes are receiving notice in 31.1 percent of the cases where notice is required by federal and state law. Still, this is double the compliance rate that existed prior to enactment of

the WICWA, and the Wisconsin tribes are confident that compliance rates will continue to increase as more persons take part in the WICWA training program. The State of Wisconsin's participation in this case as amicus curiae also demonstrates its continued commitment to working with tribes to ensure that the promises of the ICWA and WICWA are fulfilled.

D. The Need for Aggressive Enforcement of the ICWA

The Petitioners claim that the ICWA (and presumably, the WICWA) would violate a host of constitutional provisions if it is not limited by the so-called "existing Indian family" doctrine. According to the Petitioners, that doctrine requires that non-custodial Indian parents receive no protections under the ICWA. The Petitioners also claim that the adoptive placement preferences contained in Section 1915(a) cannot be applied to Indian children that were not part of an "existing Indian family" prior to removal or voluntary placement.

If the Petitioners arguments are accepted by this Court, the very existence of the Wisconsin tribes could be jeopardized. Voluntary private adoptions – like the adoption of Baby Girl in this case – account for one-half of the total number of adoptions of children of all ages in the United States. HHS, Administration for Children and Families, "*How Many Children Were Adopted in 2007 and 2008?*" at 11 (Sept. 2011) (private adoptions have steadily accounted for 46-47 percent of the total number of adoptions

during the past decade). Almost 95 percent of all voluntary adoptions that occur are of infants born to unmarried mothers. Kathy S. Stolley, *Statistics on Adoption in the United States*, 3(1) The Future of Child. 26, 32 (Spring 1993). Because these infants are relinquished at birth, it would be difficult for them to be considered part of an "existing Indian family."

The amici are all small tribes. For example, the St. Croix Chippewa, Sokaogon Chippewa, and Forest County Potawatomi each have fewer than 1,500 citizens.[6] Ten out of the 11 Wisconsin tribes have fewer than 10,000 citizens. The preliminary progress made in Wisconsin following codification of the ICWA into State law is threatened by these proceedings, which could eliminate the Act's applicability to almost 50 percent of all Indian adopted children who reside off-reservation. When coupled with the State's compliance record for Indian children in foster care, the impact on the amici could be enormous.

Despite what the Petitioners' supporters argue, the amici cannot protect their interests solely through the exertion of jurisdiction over Indian children domiciled within reservation boundaries. Many tribes have small or non-existent land bases. For example, the Ho-Chunk Nation does not have a reservation. It holds just 4,017 acres of trust lands scattered across

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[6] The amici are not alone. Approximately one-half of all Indian tribes in the lower 48 states have 1,500 or fewer citizens. *See generally Tiller's Guide to Indian Country* (Veronica E. Velarde Tiller ed. 2005).

14 counties. The Nation uses this land for governmental buildings, economic development, natural resources, and housing. Consequently, only 20% of tribal citizens (1,312 persons) are able to live on lands that are considered Indian country under federal law. Other tribes may have larger land bases, but that still does not guarantee that this land is available for housing. For example, 88 percent of the lands owned by the Bad River Band are undeveloped; most of these lands are unsuitable for housing due to their proximity to wetlands or other water sources. *See also* Wisconsin State Senate and Assembly Joint Hearing on ICWA Codification LRB 0150/3 (Sept. 16, 2009) (testimony of Greg Miller, Vice President of the Stockbridge Munsee Community, indicating that only half of the 1,500 tribal citizens live on-reservation, meaning that "you will be hard pressed to find a family who has not been affected by the removal of Indian children" even following ICWA's enactment). For these and other reasons, the majority of the amici's tribal citizens live off-reservation, which makes application of the ICWA even more important.

II. ICWA'S LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS CONSIDERED AND REJECTED THE "EXISTING INDIAN FAMILY" DOCTRINE

The Wisconsin amici agree *in toto* with the Cherokee Nation's analysis of Section 1915(a), which provides the placement preferences that "*shall* be given" by state courts in "*any* adoptive placement" of

an Indian child. 25 U.S.C. § 1915(a). The Petitioners attempt to avoid these arguments by claiming that the legislative history of the ICWA supports application of the "existing Indian family" doctrine to adoptive proceedings under Section 1915(a). Pet. Br. at 52 (citing H.R. Rep. No. 95-1386). Of course, this Court should not resort to the legislative history unless the statute is ambiguous, which it is not. *E.g.*, *U.S. v. Gonzalez*, 520 U.S. 1, 6 (1997); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). Regardless, however, the legislative history does not support the Petitioners' argument.

Congress heard exhaustive testimony, which led it to conclude that Indian children, Indian biological parents, and Indian tribes all have interests in child placement decisions. It makes no sense to eliminate the *tribe's* right to have a tribal-citizen-eligible child placed in an Indian adoptive home, because the *Indian biological parent* failed to exert physical custody over the child prior to termination of their parental rights. The rights of the tribe and the biological parents are distinct from one another. *Holyfield*, 490 U.S. at 52 ("[T]he tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.").

More specifically, however, the legislative history demonstrates that Congress explicitly considered and rejected any "existing Indian family" exception to the ICWA.

A. Congress Decided Not To Require "Significant Contacts" With an Indian Tribe Prior to Application of the ICWA

The "existing Indian family" doctrine has two variations, neither of which are supported by the ICWA. One version requires that an Indian child reside in a home that adheres to the cultural and traditional practices of the tribe. *In re Alexandria Y.*, 53 Cal. Rptr. 2d 679, 681, 687 (Ct. App. 1996) (refusing to apply the ICWA because neither Indian child nor Indian biological mother had maintained connection with "Indian life"). The other version requires that an Indian child be in the custody of an Indian parent for the Act to be effective. *Claymore v. Serr*, 405 N.W.2d 650, 654 (S.D. 1987) (refusing to apply the ICWA because the Indian child never resided with her Indian biological father). The goal of both variations is the same: to determine whether a particular child is "Indian enough" for the tribe to have an identifiable interest that makes the ICWA applicable. In the first category of cases, the court addresses this question directly. In the second category, the court uses the custody of an Indian parent to serve as a proxy for the "Indianness" of the child.

The Petitioners and their amici alternate between these variations of the "existing Indian family" doctrine. At the trial level, the Petitioners argued the first variation: the ICWA did not apply because the child and biological father weren't "really" Indian. Pls.' Post-Trial Br. at 11 (claiming that the birth father's connection to the Cherokee Nation was "in

name only" and that he did not have "a strong cultural tie" to the tribe). In this Court, the Petitioners now claim that they are not questioning whether the biological father is "Indian-enough," Pet. Br. at 40-41, even though they repeatedly refer to the blood quantum of the father, a factor typically used in such cases. *E.g.*, Pet. Br. at 6; GAL Br. at 18, 52. Their amici, however, continue to make this argument directly. For example, the Brief of the Adoptive Parents Committee alleges that due to constitutional concerns, the ICWA only applies to children domiciled off-reservation if the child's parents "maintain significant social, cultural, or political relationship to the tribe." Adoptive Parents Committee Br. at 16. *See also* Christian Alliance for Indian Child Welfare Br. at 5 ("If ICWA applies to an Indian child domiciled *off* the tribe's reservation, then it applies only if the child has significant cultural, social, and political contacts with the tribe.") (emphasis in original).

The legislative history of the ICWA demonstrates that Congress explicitly considered whether to limit the statute's application to children who were not only eligible for tribal citizenship, but who also maintained a connection with their tribe either personally or through their parents. This "existing Indian family" doctrine was introduced in the second draft of Senate Bill 1214, in 1977. Indian Child Welfare Act, S. 1214, 95th Cong. (1977). In that draft, key provisions of the bill (including the tribal court transfer, and tribal notice and intervention provisions, would not apply if the Indian child resided off-reservation

and had no "significant contacts with an Indian tribe." *Id.* § 102(f). Whether a particular child had significant contacts with the tribe was an issue of fact to be determined by the courts after considering factors such as "family ties within the tribe," "prior residency on the reservation for appreciable periods of time," "statements of the child demonstrating a strong sense of self-identity as an Indian," "or any other elements which reflect a continuing tribal relationship." *Id.* § 102(f). The Senate adopted this version of the bill on November 3, 1977. S. Rep. No. 95-597, at 4-6 (1977) (providing text of the bill).[7]

When the House took up the ICWA it began with Senate Bill 1214, and held hearings on February 9 and March 9, 1978. The Bureau of Indian Affairs ("BIA"), the Department of Health, Education and Welfare ("HEW"), and certain adoption agencies opposed its passage because they felt that the "significant contacts" test was not strong enough. BIA and HEW officials stated that the bill should never apply to parents and children of "mixed backgrounds" who

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[7] Even the Senate bill noted that "[a] finding that such Indian child does not have significant contacts with an Indian tribe . . . *does not waive the preference standards for placement* set forth in section 103 of this Act." S. 1214 § 102(f) (emphasis added). The placement preferences in the Senate Bill prioritized placement in an Indian home where the head of the household was a member of the tribe in which the child had "significant contacts." *Id.* at § 103(a). But if no such home existed, it allowed placement in any "Indian home approved by the tribe" that the child was eligible for citizenship in. *Id.*

live off-reservation in urban settings. 1978 House Hearings at 54-55, 59. The North American Center on Adoption's ARENA project agreed.

ARENA was "concerned about what determines significant contact with an Indian tribe." 1978 House Hearings at 143. It noted that a child could be black and Indian and live with a black parent off-reservation, yet the bill would not allow that child to be placed with a black family even though supposedly "[t]heir identity problems will be less in the black culture than they will be in the Indian culture." *Id.* Alternatively, the organization claimed that a child could be ripped away from his Caucasian grandparent because of some Indian ancestry. *Id.* ARENA also argued that if the parent lived off-reservation, and had a child out of wedlock, they should be able to conceal any child protection proceedings from the Indian tribe, and place that child with whomever they pleased. *Id.* at 143-44. At the time, Representative Taylor responded to these concerns by noting that "the significant contact test that is contained in the bill is designed to solve the problem that you have talked about *where an Indian child is raised outside an Indian setting* and has very limited or no contact with a tribe." *Id.* at 147-48 (emphasis added).

The House Hearings also included a significant amount of testimony arguing that the significant contact test was too restrictive and should not be used. Mike Ranco, Executive Director of Health and Social Services for the Central Maine Indian Association

informed committee members that 52 percent of the Indian population in Maine lived off-reservation. Most of these people lived in northern Maine, far from any reservation. *Id.* at 112. Ranco's research indicated that these families were in greatest need of the support that the ICWA could provide, yet the Senate Bill would not help them because of the significant contacts test. *Id.* at 113. Robert Aitken, Director of Social Services for the Minnesota Chippewa Tribe agreed, noting that there were many Indian families who lived off-reservation, particularly when their children were young. *Id.* at 130.

Voices on both sides of the "existing Indian family" debate were therefore considered. The House resolved these debates by rewriting the bill. Representative Udall introduced House Bill 12533. Indian Child Welfare Act, H.R. 12533, 95th Cong. (1978). This compromise bill was responsive to both sides. It allowed biological parents involved in involuntary child protection proceedings to object to any transfer of those proceedings to tribal court. H.R. 12533 § 101(b). The new bill did not require that Indian tribes be provided notice in purely voluntary adoption proceedings. But House Bill 12533 eliminated the "significant contact" language and provided that the ICWA applied to every Indian child, regardless of the extent of their prior connections to the tribe or Indian biological parent. H.R. 12533 §§ 102(a), 105(a).

House Bill 12533 was passed by the House of Representatives, and the substance of this bill prevailed during the conference committee. The

consideration and ultimate elimination of language requiring "significant contacts" with an Indian tribe is evidence that Congress rejected the "existing Indian family" doctrine that the Petitioners now raise in this Court. *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960, 964 (Ariz. Ct. App. 2000) ("[I]t appears that Congress considered and rejected a 'significant contacts' doctrine similar to the 'existing Indian family' exception."); *In re Adoption of S.S.*, 657 N.E.2d 935, 951 (Ill. 1995) (McMorrow, J., dissenting). This Court cannot create an exception that was rejected by the legislature.

B. Congress Decided Not to Require that an Indian Child be in the Custody of their Indian Parent Before ICWA Would Apply

After Representative Udall eliminated the "significant contacts" test in his redraft of House Bill 12533, federal officials sought another, similar exception. They suggested that the ICWA be limited to cases where the child was in the custody of an Indian parent prior to the commencement of child protection proceedings.

In a May 23, 1978 letter, the DOJ claimed that the ICWA may be unconstitutional if it provides for exclusive tribal jurisdiction in all cases where an Indian child is domiciled within an Indian reservation. The DOJ also objected that all cases involving a child domiciled outside of the reservation could be

transferred to tribal court. It suggested that these problems be remedied by amending the definition of "Indian child" to require that the child be "eligible for membership in an Indian tribe and is in the custody of a parent who is a member of an Indian tribe." 1978 House Hearings at 49-50; House Report No. 95-1386, at 39. This proposed change was also pushed by the DOI. In a June 6, 1978 letter from Assistant Secretary Forest Gerard to Rep. Morris Udall, the DOI noted that "[i]f H.R. 12533 is amended as detailed herein and as recommended by the Department of Justice's letter of May 23, 1978, we would recommend that the bill be enacted." 1978 House Hearings at 42.

Congress considered, but rejected, these proposed changes. Rep. Udall repeated the Committee's view that the ICWA would withstand any constitutional challenges, including any challenges by a "non-tribal member custodian of an Indian child" who was eligible for citizenship in the tribe. 124 Cong. Rec. 38,103 (1978). The Committee did not alter the definition of "Indian child" or otherwise limit the applicability of the Act to Indian children in the physical or legal custody of an Indian biological parent, because "foster care placement and termination of parental rights . . . are actions affecting parental, not custodial, rights." *Id.*

The State of Wisconsin reviewed this legislative history when debating whether the "existing Indian family" doctrine should be included within the WICWA. It concluded that this doctrine was contrary to the clear language in the ICWA defining "Indian

child," and the legislative history supporting that definition. ICWA Codification Workgroup, Summary of the Negotiations with Stakeholders, Indian Child Welfare Codification Bill at 8 (Mar. 4, 2009). It also noted that more than 20 states had rejected it either judicially or legislatively, and that "the authority of tribes to determine their own membership is a paramount consideration in recognizing the sovereignty of tribes." *Id.* For these reasons, the State of Wisconsin rejected the "existing Indian family" doctrine, and this Court should as well.

III. THIS CASE ILLUSTRATES WHY CONGRESS ADOPTED THE PLACEMENT PREFERENCES IN SECTION 1915(a)

In an attempt to avoid the placement preferences in Section 1915(a), Petitioners claim that "Congress could not have plausibly intended to require non-Indian mothers and adoptive parents to go searching for Indian adults to adopt their child." Pet. Br. at 4, 53. They also imply that if this Court fails to overturn the South Carolina Supreme Court's decision, it will "chill[ ] prospective parents from adopting abandoned Indian children." Pet. Br. at 49. These arguments ignore the reality of the private adoption market in the United States.

A. There are Ample Indian Families Available to Adopt Baby Girl

In the United States, approximately 136,000 children are adopted each year. HHS, *Child and Family*

Services Reviews Fact Sheet, supra, at 4, 8. While this number appears high, it has actually declined from a peak of 170,000 adoptions in 1970.[8] Frank Biafora & Dawn Esposito, Adoption Data and Statistical Trends, *in Handbook of Adoption: Implications for Researchers, Practitioners and Families* 32-34, 36, 38 (2007). This is true even though the U.S. population has increased by 100 million people since that time.[9]

The low supply of healthy infants available for adoption in the United States is coupled with a high demand for such infants. Barbara Fedders, *Race and Market Values in Domestic Infant Adoption*, 88 N.C. L. Rev. 1687, 1688, 1696 (2010); Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 Tenn. L. Rev. 509, 519 (2005). The number of couples seeking to adopt infants surpasses the annual number of adoptions by a ratio of 3.3 to 1. Indeed, the wait time to adopt a healthy infant is typically two or more years. Stolley, *supra*, at 26, 37.

There are many Indian families waiting to adopt Indian infants. An example from Wisconsin is illustrative. A few years ago, a young Indian mother was

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[8] The decline in the number of children placed for adoption is due to unwed mothers increasingly choosing to keep their children. *See* Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. Legal Stud. 323, 325 (1978).

[9] U.S. Dep't of Commerce, History, http://www.census.gov/history/www/through_the_decades/fast_facts/ (last updated Oct. 18, 2012).

admitted to a Milwaukee hospital and gave birth to a healthy infant. She decided to leave the child at the hospital and take advantage of the State's "safe haven" law. The Bureau of Milwaukee Child Welfare ("BMCW") agency contracts with two private agencies to provide a full range of foster care and adoption services for the city. One of these private agencies took custody of the infant, and placement occurred with a non-Indian couple who hoped to adopt the infant.

The birth mother was Indian. A hospital worker informed BMCW that the birth mother was believed to be a citizen of the Menominee Tribe, but the private agency chose to ignore this information. The day before a termination of parental rights hearing was scheduled to take place, an official for BMCW, at great risk to his/her own career, verbally notified the Menominee Tribal Social Services Department of the case. Because the name of the birth mother could not be revealed, the Menominee Tribe then notified other Wisconsin tribes. At the court hearing in this matter, officials from the Menominee, Forest County Potawatomi, Oneida, Stockbridge-Munsee and Ho-Chunk tribes all appeared in person to protect their potential interests in the child. All had Indian families ready and willing to adopt the infant. It was ultimately determined that the child was indeed Menominee, and through court action, the baby was adopted to a Menominee couple.

This is just one example. The Menominee Tribe received 238 ICWA notices in 2012. It responded to each of these notices. If the child identified in the

notice was a citizen or eligible for citizenship, the Menominee Tribe intervened in each and every ICWA case. While the Tribe does not have the lengthy waiting list of adoptive parents that the Cherokee Nation does, *see* Cherokee Nation Br. at 17 (noting that it has at least 100 preapproved adoptive families waiting), it has never had difficulty placing a young, healthy child with a Menominee family.

Still, Petitioners' amici claim that there are not a sufficient number of Indian families willing to adopt, and therefore, the ICWA causes Indian children to languish in foster care as a result of the Act's provisions. *E.g.*, Christian Alliance for Indian Child Welfare Br. at 7. This is untrue. In 2007, two percent (9,214) of the children in foster care in the United States were Alaska Native/American Indian. During that same year, two percent (5,854) of the children that exited the foster care system (through reunification with their parents or adoption) were Alaska Native/American Indian. And two percent of children waiting to be adopted were Alaska Native/American Indian (2,190). *See* HHS, The AFCARS Report for Fiscal Year 2007 (Oct. 2009). These statistics demonstrate that the ICWA has lowered the number of Indian children in foster care and has not resulted in a disproportionate number of Indian children waiting for adoptive homes.

The HHS's most recent report to Congress establishes that states are able to find adoptive homes for 86.8 percent of all children in the foster care system. They are the least successful in placing children with

disabilities (77 percent placed) and children who enter the foster care system when they are 13 years of age or older (67.3 percent placed). "These disparities in finding permanent homes for older children and children with disabilities have been consistent findings in the Child Welfare Outcomes Reports." HHS, Child Welfare Outcomes 2007-2010: Report to Congress at 14. They apply to children of all races and citizenship. While this is certainly an area of concern, it is not a problem created or exacerbated by the ICWA,[10] and it has nothing to do with this case, which involves the attempted *private* adoption of a *healthy infant*. *See* U.S. Government Accountability Office, Report to Congressional Requests, Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States 4 (Apr. 2005) (noting that data contained "no consistent differences when comparing the length of time [Indian children] spent in foster care compared to Caucasian or other minority children").

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[10] A court can depart from the placement preferences for "good cause." 25 U.S.C. § 1915(a). Good cause is typically found when an extended family member or Indian family cannot be located to adopt the child, even after a diligent search has been completed. This situation usually arises only when the child has significant disabilities or is an older child that is part of a larger sibling group seeking to be adopted together. *See, e.g.*, *In re C.H.*, 997 P.2d 776, 780-81 (Mont. 2000); Dep't of the Interior, Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,594 (Nov. 26, 1979); 1978 House Hearings at 71, 146-47.

B. Few Indian Families are Clients of Private Adoption Agencies

Without the placement preferences in Section 1915(a), however, Indian families would have little chance of adopting Indian infants through the private adoption process. "[E]conomic interests influence adoption more than we might like to acknowledge" and "the adoption process is more like a market than less so." Michele Goodwin, *The Free-Market Approach to Adoption: The Value of A Baby*, B.C. Third World L.J. 61, 63 (2006). Couples spend upwards of $50,000 to adopt a healthy infant. Debora L. Spar, *The Baby Business: How Money, Science, and Politics Drive the Commerce of Conception* 179 (2006); Goodwin, *supra*, at 66-67.[11] The private adoption agency receives a fee of between $6,500 and $52,000. Other expenses include the payment of medical costs and costs of living for the birth mother during pregnancy, home study fees, and application fees. Jack Darcher, *Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees*, 8 Seattle J. for Soc. Just. 729, 732-33 (2010); Fedders, *supra*, at 1694-95.

Birth mothers seeking to relinquish their infants typically go to private adoption agencies to choose adoptive parents. The agency shows them prospective

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[11] The Petitioners testified in the lower court proceedings that they had spent $30,000 or $40,000 on Baby Girl's adoption. J.A. at 321.

adoptive couples who are clients of the agency, and the birth mother chooses from those couples. The willingness and ability of couples to pay for the birth mother's living expenses during pregnancy, on top of the already high agency fees, often plays a significant role in the decision-making process.

Few Indian families have $50,000+ in disposable income they can spend on the adoption process, even though they could provide a safe and loving home for a child. The average per-person income for the Wisconsin tribal amici ranges from a low of $7,589 for the Sokaogon Chippewa Community, to a high of $25,680 for the Oneida Tribe. *Tiller's Guide to Indian Country*, *supra*, at 1037-64. As a result, Indian prospective adoptive parents are rarely clients of private adoption agencies. Many private adoption agencies choose not to ask birth mothers if their child is Indian, because they do not have families to offer the birth mother that fit the placement preferences in Section 1915(a). Even when that information is volunteered by the birth mother – as it was here – agencies routinely ignore the placement preferences in the ICWA. If they contacted the Indian tribe that the child was eligible for citizenship in, that tribe could provide several suitable Indian adoptive couples. But this would not generate any money for the private adoption agency, and therefore, it is rarely done.

This problem was once rampant in Wisconsin. Private adoption agencies from around the country were recruiting birth mothers there yet refusing to follow the placement preferences in the ICWA. As a

result, the Wisconsin tribes lobbied to ensure that sanctions could be imposed against adoption agencies violating the ICWA. Section 54.05(6) of the administrative code governing the Wisconsin Department of Children and Families was amended effective June 1, 1993. It provides that if a child-placing agency "knowingly and intentionally disregards a requirement of the ICWA, the department shall by letter of notification order the child-placing agency to stop accepting for service all Indian children referred for service to the agency." Wis. Admin. C. § 54.05(6)(a). If the agency disregards this letter, the Department "shall revoke or not renew . . . the child-placing agency's license." *Id.* § 54.05(6)(b).

When the Petitioners claim that if given full force, the ICWA will "chill[ ] prospective parents from adopting abandoned Indian children," Pet. Br. at 49, they are missing the point. This very issue was raised during the congressional debates prior to enactment. HEW noted that the ICWA would disrupt voluntary, private adoption proceedings. 1978 House Hearings at 59. Tribal witnesses, including LeRoy Wilder, an attorney representing the Association on American Indian Affairs noted that if the ICWA had a chilling effect on non-Indian adoptions of Indian children, "then so be it. This bill is not designed to make the adoption of Indian children easier." *Id.* at 71. And that is exactly the point. The ease with which the Baby Girl was moved out of state without the agency or birth mother ever considering a Cherokee adoptive family or notifying the baby's biological Cherokee

father, demonstrates why the ICWA was passed in the first place. Congress determined that, absent good cause, it is in the best interests of Indian children to be raised within their extended families or by other Indian families. This Court should respect that judgment.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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APPENDIX

List of Amici Curiae

Bad River Band of Lake Superior Chippewa Indians

Forest County Potawatomi Community

Ho-Chunk Nation

Lac Courte Oreilles Band of Lake Superior Chippewa Indians

Lac du Flambeau Band of Lake Superior Chippewa Indians

Menominee Indian Tribe of Wisconsin

Oneida Tribe of Indians of Wisconsin

Red Cliff Band of Lake Superior Chippewa Indians

Sokaogon Chippewa Community, Mole Lake Indian Reservation

St. Croix Chippewa Indians of Wisconsin

Stockbridge-Munsee Community